

E8k9chr1

Trial

1 UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 UNITED STATES OF AMERICA

4 v.

12 CR 626 (ER)

5 RAYMOND CHRISTIAN a/k/a

6 "Reckless"

7 GLENN THOMAS, a/k/a "Gucci"

8 TYRELL WHITAKER, a/k/a "Bow Wow"

9 Defendants

10 -----x

New York, N.Y.  
August 20, 2014  
9:25 a.m.

11 Before:

HON. EDGARDO RAMOS

District Judge

12 APPEARANCES

13 PREET BHARARA

United States Attorney for the

14 Southern District of New York

ANDREW BAUER

15 KAN M. NAWADAY

Assistant United States Attorney

16 DAVID S. GREENFIELD

and

17 ANTHONY STRAZZA

Attorneys for Defendant Christian

18 LAW OFFICES OF DON BUCHWALD

Attorney for Defendant Thomas

19 DON D. BUCHWALD

20 KELLEY DRYE & WARREN LLP

Attorney for Defendant Thomas

21 LEVI DOWNING

22 GEORGE ROBERT GOLTZER

and

23 YING STAFFORD

Attorneys for Defendant Whitaker

24 -- also present--

25 S.A. Andrei Petron - FBI

E8k9chr1

Trial

1 (In open court)

2 (Trial resumed; jury not present)

3 THE COURT: Good morning all.

4 Anything to report?

5 DEFENDANT THOMAS: Your Honor, I got something I want  
6 to put on the record.

7 MR. BUCHWALD: Your Honor if we could go into  
8 chambers?

9 THE COURT: In chambers?

10 MR. BUCHWALD: Ex parte.

11 THE COURT: Okay.

12 MR. NAWADAY: We can leave -- the government can leave  
13 the courtroom if that makes it easier, your Honor.

14 THE COURT: Okay. Do that.

15 Would you mind terribly making sure that no one comes  
16 in.

17 MR. BAUER: We will do that.

18 (Pages 2048-2051 SEALED by order of the Court)

E8k9chr1

Trial

1 THE COURT: Can I get some sort of estimate -- well  
2 some description of what's going to happen this morning or some  
3 estimate as to how long it will take?

4 MR. BAUER: I think it's defense counsel, their show.

5 THE COURT: But there are no other issues, correct?

6 MR. NAWADAY: That's correct, your Honor. We expected  
7 that there would be stipulations read by the defense this  
8 morning and then we excuse the jurors for an early lunch while  
9 we do the charge conference. We'd also respectfully suggest  
10 that at that juncture the Court advise the defendants of -- the  
11 fact that its their decision whether to testify or not and then  
12 when the jurors come back after lunch I assume the defense can  
13 rest or they can call more witnesses, I don't know, and then we  
14 can move into the government's summations.

15 THE COURT: Okay.

16 MR. NAWADAY: And then the defense summations.

17 MR. BUCHWALD: With respect to the allocutions  
18 concerning the decision to testify, we again ask that that be  
19 ex parte.

20 THE COURT: Okay. We'll get to that -- I don't know  
21 that that needs to be ex parte.

22 MR. GOLTZER: He's got a reason for asking.

23 THE COURT: Okay.

24 Are we otherwise ready for the jury?

25 MR. BAUER: Yes, your Honor.

E8k9chr1

Trial

1 THE COURT: Let's see if the jury is here. Are they  
2 here.

3 THE DEPUTY CLERK: Yes, your Honor.

4 (Continued on next page)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

E8k9chr1

Trial

1 (Jury present)

2 THE COURT: Good morning everyone. Please be seated.

3 Ladies and gentlemen, let me give you a little preview  
4 of what we have planned for you today. As you know, the  
5 government rested yesterday. The defense will now put on its  
6 case. That will consist, I believe, exclusively of  
7 stipulations which will be read to you. And that will be done  
8 right now, as soon as we get started. That should not take too  
9 long. However, what we're going to do next is we're going to  
10 break for a very, very early lunch and give you probably a  
11 couple of hours and then have you come back at a certain point  
12 and that will be determined depending on how long this morning  
13 goes. So you may have a couple of extra hours for lunch. And  
14 then when we come back in the early afternoon we'll go directly  
15 to the government's summation. So we will begin with the  
16 defense case.

17 Mr. Strazza.

18 MR. STRAZZA: Good morning. I'm holding in my hand  
19 what has been marked as Defendant Christian's Exhibit H in  
20 evidence. It's a stipulation between the parties. Which  
21 states the following.

22 It is hereby stipulated and agreed by and between the  
23 United States of America, by Preet Bharara, United States  
24 Attorney for the Southern District of New York, Andrew Bauer  
25 and Kan M. Nawaday, Assistant United States Attorneys, of

E8k9chr1

Trial

1 counsel, and: A. Raymond Christian, the defendant, by and  
2 through the consent of his attorneys, David Greenfield and  
3 Anthony Strazza, Esquires; B. Tyrell Whitaker, the defendant,  
4 by and through the consent of his attorneys, George Goltzer and  
5 Ying Stafford, Esquires; and C. Glenn Thomas, the defendant, by  
6 and through the consent of his attorneys, Don Buchwald and  
7 Joshua Dratel, Esquires that:

8           On March 5, 2014 Tarrence Smith met with government  
9 agents, one of whom took notes during the meeting. Those notes  
10 were not intended to be a verbatim transcript but were intended  
11 to summarize the substance of Smith's statements accurately.  
12 According to those notes, Smith stated in substance and in part  
13 on the night of the Henry murder Akinto Boone came out of the  
14 bathroom with one of the unknown males. Smith then got up off  
15 of the floor while Boone and the unknown male were wrestling  
16 and stabbed the guy in the side. This unknown male was the  
17 last one in the back of the house. As the others had run  
18 towards the front of the house, Smith stabbed the unknown male  
19 twice. The guy who was stabbed lost his gun to Akinto Boone.

20           That's dated August 19, 2014 and signed by all  
21 parties.

22           I'm also holding in my hand what we submit into  
23 evidence as Defendant Christian Exhibit I, with the consent of  
24 the government.

25           And the parties, same parties with the previous

E8k9chr1

Trial

1 stipulation, have agreed and stipulated that if a  
2 representative from the New York State Police crime laboratory  
3 came here to testify, that witness would testify that what I'm  
4 holding in my hand, Defendant Christian's Exhibit I, is a true  
5 and accurate copy of the laboratory protocols that were in  
6 effect for 2010, 2011 at the time that the articles tested by  
7 this lab were tested in this case. Thank you.

8 THE COURT: Thank you, Mr. Strazza.

9 MR. STRAZZA: Just so the record is clear, we're  
10 offering Defendant Christian I into evidence with the consent  
11 of the government.

12 THE COURT: And H as well?

13 MR. STRAZZA: Yes.

14 THE COURT: Defendant Christian H and I will be  
15 received.

16 (Defendant Christian's Exhibits H and I received in  
17 evidence)

18 THE COURT: Ms. Stafford.

19 MS. STAFFORD: Thank you, your Honor.

20 Good morning. On behalf of Mr. Whitaker we have  
21 several stipulations. And I'm going to start with Whitaker C.  
22 It is hereby --

23 THE COURT: I'm sorry, Ms. Stafford. Can I just ask  
24 you to keep your voice up.

25 MS. STAFFORD: Oh, sure.

E8k9chr1

Trial

1           It is hereby stipulated and agreed by and between the  
2   United States of America, by Preet Bharara, the United States  
3   Attorney for the Southern District of New York, Andrew Bauer  
4   and Kan M. Nawaday, Assistant United States Attorneys, of  
5   counsel, and Raymond Christian, the defendant, by and through  
6   consent of his attorneys, David Greenfield and Anthony Strazza,  
7   Esquires; Tyrell Whitaker, by and through the consent of his  
8   attorneys, George Goltzer and Ying Stafford; Glenn Thomas, the  
9   defendant, by and through the consent of his attorneys, Don  
10   Buchwald and Joshua Dratel, that on December 15, 2010 Anthony  
11   Baynes was interviewed at St. Luke's Hospital in Newburgh,  
12   New York by New York government agents that took notes during  
13   the meeting. Those notes were not intended to be a verbatim  
14   transcript but were intended to summarize the substance of  
15   Baynes' statements accurately. According to those notes,  
16   Baynes initially stated in substance and in part Bash and  
17   Baby E planned on robbing the weed spot at 54 Chambers Street.  
18   They planned the robbery on Dubois Street. At 10 p.m. Bash and  
19   Baby told me and Laquavious to help them rob the weed spot.  
20   But we went home and then we went back out later to see if they  
21   got anything. He saw a lot of people running. Bash and Baby E  
22   were chased by the guys. And that's when someone stabbed him.

23           According to those notes, Baynes then stated in  
24   substance and in part he was walking down Lander Street, toward  
25   Broadway. Laquavious Boykin -- with Laquavious Boykin. He saw



E8k9chr1

Trial

1 a group of black males running towards them. The next thing he  
2 knew that the unknown black males were shooting at him and  
3 Laquavious and he shot back. He walked from Lander Street to  
4 the hospital. Baynes then stated in substance and in part a  
5 couple of people wanted to rob a weed spot. One is called Baby  
6 and the other is Bash from the Heights. Laquavious, his  
7 brother, Raymond, Baby, Bash, and the defendant were in a  
8 hallway on Dubois Street and Farrington when this was being  
9 discussed. Baynes then stated in substance and in part Baynes,  
10 Laquavious, his brother, Raymond, Baby, and Bash and a bunch of  
11 unknown people walked past 54 Chambers Street and they walked  
12 to Dubois Street. They went past the weed spot at 54 Chambers  
13 Street and that's when everyone started running. He and  
14 Laquavious ran both ways in the house, got shot twice at him  
15 and Laquavious. He was running. He saw Baby and Bash with  
16 guns running up First and Chambers. Baynes then stated while  
17 everyone was inside he and Laquavious could hear the older guy  
18 tell someone on the phone to bring the chain because they knew  
19 about the hit spot. They went down First Street and on the  
20 north side of First Street that's when they saw Bash with the  
21 gun in his hand and Baby E with the gun in his hand. He and  
22 Laquavious passed Bash and Baby E. That's when they heard  
23 shots fired. That's when he hears two to three gunshots.  
24 Finally, Baynes then stated in part and in substance Bash was  
25 with a group of boys running with a gun. Baby E, I know him as

E8k9chr1

Trial

1 Baby E, and saw him running with a gun.

2 Your Honor, we'd ask that that be admitted into  
3 evidence.

4 THE COURT: What exhibit number is that?

5 MS. STAFFORD: That's Whitaker C.

6 THE COURT: Whitaker C will be received.

7 (Defendant Whitaker's Exhibit C received in evidence)

8 MS. STAFFORD: I'm going to skip the preamble, if you  
9 don't mind, your Honor.

10 THE COURT: Not at all.

11 MS. STAFFORD: It is stipulated and agreed by the  
12 parties, I'm reading from Whitaker D, on August 22, 2011  
13 Detective Cortez testified at a suppression hearing at the  
14 Orange County Courthouse in Goshen, New York. During this  
15 testimony Detective Cortez was asked the following questions  
16 and gave the following answers regarding his interview of  
17 Anthony Baynes on December 15, 2010:

18 "A. At that point I Mirandized him.

19 "Q. And how did you do so?

20 "A. From a preprinted form.

21 "Q. Detective, did you read from the form itself or did you do  
22 it from memory?

23 "I read it. I read the form.

24 "Q. Did he indicate that he understood the questions?

25 "A. Yes.

E8k9chr1

Trial

1 "Q. Did he indicate whether or not he is willing to speak to  
2 you?

3 "A. Yes.

4 "Q. And did he answer all the questions in the affirmative?

5 "A. Yes.

6 "Q. And did he ask for an attorney?

7 "A. No.

8 "Q. Who signed the form?

9 "A. I signed on the top as a witness, or the person who read  
10 it; and the witness was Stan; and the defendant, Anthony  
11 Baynes.

12 "Q. After the Miranda warnings were read and he agreed to  
13 speak to you and signed the form, did you ask another question?

14 "A. We continued the conversation."

15 On August 22, 2011 Officer Loscerbo testified at a  
16 suppression hearing at the Orange County Courthouse in Goshen,  
17 New York. During his testimony Detective Loscerbo was asked  
18 the following questions and gave the following answers  
19 regarding his interview with Anthony Baynes on December 15,  
20 2010.

21 "Q. Thank you, Detective. Directing your attention to  
22 December 15, 2010 just shortly after midnight. Did you have  
23 occasion to respond to the City of Newburgh Police Department  
24 in at 55 Broadway?

25 "A. Yes.

E8k9chr1

Trial

1 "Q. Okay. What else, if anything, did he tell you about  
2 what -- what Mr. Baynes told you.

3 "He stated that he wanted to do a robbery of the weed  
4 house. They wanted him and Laquavious Boykin to help him and  
5 they both said no. He and Laquavious Boykin went to 75 Mill  
6 Street and then came out a little while later to see if Bash  
7 and Baby E completed the robbery, at which point he saw them  
8 running on Chambers Street and heard some -- some kind of shots  
9 and then went towards 54 Chambers."

10 And that is Whitaker D, your Honor. We'd ask that  
11 that be admitted.

12 THE COURT: Whitaker D will be received.

13 (Defendant Whitaker's Exhibit D received in evidence)

14 MS. STAFFORD: I'm now reading from Whitaker E.

15 It is agreed between the parties that on January 27,  
16 2012 James Mallory met with government agents, one of whom took  
17 notes during the meeting. Those notes were not intended to be  
18 a verbatim transcript but were intended to summarize the  
19 substance of Mallory's statements accurately. According to  
20 those notes, James Mallory was shown video recordings on  
21 December 15, 2010. The recordings were taken from cameras  
22 located outside of a deli bodega at 56 Lander Street, City of  
23 Newburgh, Newburgh, New York. Those notes reflect in substance  
24 and in part at 25 and 26 -- 2506 Mallory identified Bow Wow,  
25 who turns and faces a camera. Mallory notes that Bow Wow has

E8k9chr1

Trial

1 light skin which is observable in the video.

2 That's Whitaker E and I'd ask that that be admitted.

3 THE COURT: Whitaker E will be received.

4 (Defendant Whitaker's Exhibit E received in evidence)

5 MS. STAFFORD: Now, Whitaker F. It is stipulated by  
6 and between the parties on May 13, 2011 Anthony Baynes met with  
7 an Orange County assistant district attorney and a Newburgh  
8 police department detective who took notes during the meeting.  
9 Those notes were not intended to be a verbatim transcript but  
10 were intended to summarize the substance of Baynes' statements  
11 accurately. Below is a portion of those statements.

12 And the handwritten notes indicate: Bow Wow. Skinny  
13 braids. Light-skinned. Moved to Virginia. And there is an  
14 arrow that points downward. Family may live on City Terrace.  
15 Tattoo, left arm. In parentheses, we fought before.

16 And that's Whitaker F, your Honor. If we may have  
17 that admitted.

18 THE COURT: Whitaker F will be received.

19 (Defendant Whitaker's Exhibit F received in evidence)

20 MS. STAFFORD: Finally, Whitaker G. It is stipulated  
21 and agreed by and between the parties on March 15, 2012 Ramone  
22 McDermott met with government agents, one of whom took notes  
23 during the meeting. Those notes were not intended to be a  
24 verbatim transcript but were intended to summarize the  
25 substance of McDermott's statements accurately. According to

E8k9chr1

Trial

1 those notes, McDermott stated in substance and in part: The  
2 night of the Joker murder Bow Wow had a half-mask on. Bow Wow  
3 was wearing red and blue color Hollister brand hooded  
4 sweatshirt, red Nike brand ACG boots. Then on July 18, 2012  
5 Ramone McDermott met again with the agents, one of whom was  
6 taking notes during the meeting. Those notes were not intended  
7 to be a transcript but were intended to summarize the substance  
8 of McDermott's statements accurately. According to those  
9 notes, the night of the Joker murder the shirt was black  
10 Hollister brand.

11 And that's Whitaker G.

12 THE COURT: Whitaker G will be received.

13 (Defendant Whitaker's Exhibit G received in evidence)

14 MS. STAFFORD: Thank you, your Honor.

15 MR. BAUER: Your Honor, between Ms. Stafford and  
16 Mr. Buchwald, can we ask for a limiting instruction that we  
17 discussed along the lines of -- say it at sidebar or say it out  
18 loud? I don't think it's controversial. Sidebar?

19 THE COURT: Yes. Let's go to sidebar.

20 (Continued on next page)

E8k9chr1

Trial

1 (At the sidebar)

2 MR. BAUER: It's nothing in particular. Any of these  
3 stipulations. Just that these stipulations are being offered  
4 not for the truth but rather to assist the jury in assessing  
5 the witness's credibility. I think it's in your jury  
6 instruction. I don't think it's controversial. We ask that it  
7 be reminded to the jury now.

8 MR. GOLTZER: The ones that are under oath from  
9 suppression hearing transcripts, because they are sworn, are  
10 admissible for the truth.

11 MS. STAFFORD: That's Whitaker D.

12 MR. BAUER: Under what rule? I'm not questioning you.

13 MS. STAFFORD: Prior sworn testimony.

14 MR. GOLTZER: No, it's not. It's just -- I can't cite  
15 the rule but it's --

16 MR. BAUER: Still hearsay.

17 MR. GOLTZER: No, no, no.

18 MR. BAUER: It's still extrinsic evidence.

19 THE COURT: Well I think -- I don't recall what  
20 specifically the sworn testimony was, but I do know that at  
21 hearings hearsay testimony is frequently allowed. So I can't  
22 speak to whether or not that particular should come in for the  
23 truth or not.

24 MR. GOLTZER: It's not hearsay at the suppression  
25 hearing. He testified I gave Miranda warnings and then he

E8k9chr1

Trial

1 testified that's what the person told him. So I mean obviously  
2 that's what he told him is for impeachment.

3 MR. BAUER: Right.

4 MR. GOLTZER: But the fact that he told them that is  
5 admissible for the truth and, of course, that he gave Miranda  
6 warnings would be admissible for the truth.

7 MR. BAUER: Your point is that what Cortez said is  
8 offered for the truth?

9 MR. GOLTZER: Correct.

10 MR. BAUER: What Baynes told Cortez, you agree, still  
11 falls under our limiting instruction?

12 MR. GOLTZER: Absolutely. And what Loscerbo testified  
13 to is admissible for the truth, but what he was told by  
14 somebody else is impeachment.

15 MR. BAUER: So why don't we make this simple and say  
16 since you're hearing about witnesses who testified before you,  
17 their prior statements, they are not being offered for the  
18 truth but rather just --

19 MR. GOLTZER: -- to impeach credibility.

20 THE COURT: I will do that.

21 (Continued on next page)



E8k9chr1

Trial

1 (In open court)

2 THE COURT: Ladies and gentlemen, what I'm about to  
3 say relates generally to what you've been hearing this morning  
4 and what you will hear, I assume, some more of in a few  
5 moments. The defendants have presented to you statements that  
6 they assert were made by certain of the witnesses that  
7 testified here before you. And they apparently are going to  
8 argue that certain of those statements were inconsistent with  
9 what they testified to at trial. The statements that are being  
10 put before you by the witnesses that testified are not being  
11 presented to you for their truth but rather in order to help  
12 you assess the credibility of the witnesses that came before  
13 you. So the statements that are being attributed to those  
14 individuals now are not being offered for the truth but rather  
15 to help you make a determination as to whether or not you can  
16 credit the testimony that they provided here at trial. Okay.  
17 Very well.

18 Mr. Buchwald.

19 MR. BUCHWALD: Thank you, your Honor. Again, Your  
20 Honor we have a group of stipulations. The first we have  
21 marked as Defendant Thomas' Exhibit T1. And it reads as  
22 follows.

23 It is hereby stipulated and agreed by and between the  
24 parties that records made and maintained from the New York  
25 State court and prison systems in the regular course of

E8k9chr1

Trial

1 business reflect the following.

2 A. On March 16 of 2008 Glenn Thomas was arrested in  
3 Newburgh, New York for offenses which had occurred in October  
4 of 2007. Mr. Thomas pled guilty to those charges and as a  
5 result he remained incarcerated in either Orange County jail in  
6 Goshen, New York or in other New York State prison facilities  
7 in upstate New York from March 16, 2008 through and including  
8 September 14, 2010 except for three days in March of 2010.

9 B. Glenn Thomas was arrested in Newburgh, New York on  
10 February 28, 2011 and charged in state court with the gun  
11 possession about which police officers Kevin Lahar and William  
12 Lahar testified here. Mr. Thomas was held on those charges at  
13 Orange County jail in Goshen, New York on July 3, 2012 when the  
14 New York state charges were dropped and Mr. Thomas was brought  
15 to the federal court and arraigned on the federal gun  
16 possession charge. The federal charge involved the same gun  
17 from February 28, 2011. It was that federal charge to which  
18 Mr. Thomas pled guilty on March 1, 2012 and to which he was  
19 sentenced to 37 months incarceration on July 3, 2012. The  
20 transcript of Mr. Thomas' guilty plea was received in evidence  
21 at this trial as Government Exhibit 415.

22 C. Mr. Thomas was, thus, either in the custody of New  
23 York state or federal prison authorities everyday from the date  
24 of his February 28, 2011 arrest through the end of 2012.

25 It's further stipulated and agreed that this

E8k9chr1

Trial

1 stipulation may be received in evidence as a defense exhibit  
2 during the defense case. And we offer T1 into evidence.

3 THE COURT: T1 will be received.

4 (Defendant Thomas' Exhibit T1 received in evidence)

5 MR. BUCHWALD: We also offer at this time what has  
6 previously been marked as Government Exhibit 416, and we're  
7 happy to keep the government exhibit number, which is the  
8 judgment of conviction referred to, the federal judgment of  
9 conviction where the 37-month sentence was imposed.

10 THE COURT: Very well.

11 MR. BUCHWALD: Government Exhibit 416 received, your  
12 Honor?

13 THE COURT: I believe 416 is in evidence.

14 MR. BUCHWALD: I think 415 had been received. I don't  
15 think 416 had been received, and we are offering it now.

16 THE COURT: Any objection?

17 MR. BAUER: No, your Honor.

18 THE COURT: 416 will be received.

19 (Government's Exhibit 416 received in evidence)

20 MR. BUCHWALD: Next one is Defendants' Exhibit T2, the  
21 next stipulation.

22 It is hereby stipulated and agreed by and between the  
23 undersigned parties that on December 15, 2010 Glenn Thomas  
24 resided at 138 Lander Street in Newburgh, New York.

25 It is further stipulated and agreed that this

E8k9chr1

Trial

1 stipulation may be received in evidence as a defense exhibit.

2 And we offer Exhibit T2.

3 THE COURT: T2 will be received.

4 (Defendant Thomas' Exhibit T2 received in evidence)

5 MR. BUCHWALD: We now have Defendants' Exhibit T3  
6 which is another stipulation.

7 It reads as follows: It is hereby stipulated and  
8 agreed by and between the undersigned parties as follows.

9 1. On March 1 of 2012 Anthony Baynes met with  
10 government agents, one of whom took notes at the meeting.  
11 Those notes were not intended to be a verbatim transcript but  
12 were intended to summarize the substance of Baynes' statements  
13 accurately. According to those notes, Baynes stated in  
14 substance and in part, "At another time J-Mark said that Big L  
15 had something to do with the Joker homicide."

16 2. On December 15, 2010 Anthony Baynes, while at St.  
17 Luke's Hospital in Newburgh, New York met with Newburgh police  
18 department detectives, one of whom took notes. Those notes  
19 were not intended to be a verbatim transcript but were intended  
20 to summarize the substance of Baynes' statements accurately.  
21 According to those notes, Baynes stated in substance and in  
22 part: Baynes waited on the porch with Quay Quay. The older  
23 guy told Baby E and Bash that he was calling J-Mark and spoke  
24 to J-Mark on the phone. While everyone was in the house on  
25 Dubois, Baynes could hear the older guy tell someone on the

E8k9chr1

Trial

1 phone to bring the chain through because they are about to hit  
2 the spot. Baynes knows the chain to mean gun.

3 3. On May 13 of 2011 Anthony Baynes met with an  
4 Orange County assistant district attorney and a Newburgh police  
5 department detective who took notes. These notes were not  
6 intended as a verbatim transcript but were intended to  
7 summarize the substance of Baynes' statements accurately.  
8 According to these notes Baynes said on two separate occasions  
9 during the interview, "I thought Bash was the shooter. And I  
10 thought Bash did it."

11 4. On May 13, 2011 Baynes met with the Orange County  
12 assistant district attorney and Newburgh police department  
13 detective who took notes. The notes were intended -- not  
14 intended to be a verbatim transcript but were intended to  
15 summarize the substance of Baynes' statements accurately.  
16 According to those notes, Baynes stated in substance and in  
17 part, "Before we went to Crown Fried they, referring to  
18 everyone who had arrived at Dubois except Baynes himself and  
19 Quay Quay, had guns."

20 5. On May 20, 2011 Anthony Baynes met with an Orange  
21 County assistant district attorney and a Newburgh police  
22 department detective who took notes. The notes were not  
23 intended as a verbatim transcript but were intended to  
24 summarize the substance of Baynes' statements accurately.

25 According to those notes Baynes stated in substance

E8k9chr1

Trial

1 and in part, "One of the robbers present at 54 Chambers was a  
2 black male Baynes knew as G who Baynes described as a dark,  
3 skinny teenager who was 18 or 19 years old from the Heights  
4 with Baby E."

5 We offer Exhibit T3 into evidence, your Honor.

6 THE COURT: And T3 will be received.

7 (Defendant Thomas' Exhibit T3 received in evidence)

8 MR. BUCHWALD: The next one, your Honor, is T4. T4  
9 reads as follows:

10 It is hereby stipulated and agreed by and between the  
11 undersigned parties as follows:

12 1. On March 11, 2014 Jamar Mallory met with  
13 government agents, one of whom took notes at the meeting.  
14 Those notes were not intended to be a verbatim transcript but  
15 were intended to summarize the substance of Mallory's  
16 statements accurately. Those notes do not reflect Mallory's  
17 stating at that interview that Glenn Thomas brought back a  
18 black .38 caliber firearm after December 15, 2010. Notes of  
19 interviews of Mallory do not reflect Mallory having made such a  
20 claim at any proffer session prior to May 2, 2014.

21 2. On May 2, 2014 Jamar Mallory met with government  
22 agents, one of whom took notes at the meeting. The notes were  
23 not intended to be a verbatim transcript but were intended to  
24 summarize the substance of Mallory's statements accurately.  
25 According to those notes, Mallory stated in substance and in

E8k9chr1

Trial

1 part that Glenn Thomas told him that Glenn Thomas had turned  
2 off First Street and ran up Lander to his house following the  
3 robbery at 54 Chambers Street.

4 3. On June 26 of 2014 Jamar Mallory met with  
5 government agents, one of whom took notes at the meeting. The  
6 notes were not intended to be a verbatim transcript but were  
7 intended to summarize the substance of Mallory's statements  
8 accurately. According to those notes, Mallory stated in  
9 substance and in part that on the night of the 54 Chambers  
10 Street robbery he had received a text from L-1 on his phone and  
11 that he could not get telephone calls on that phone.

12 (Continued on next page)

13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

E8knchr2

1  
2 MR. BUCHWALD: Your Honor we offer T4 into evidence.

3 THE COURT: T4 will be received.

4 (Defendant's Exhibit T4 received in evidence)

5 MR. BUCHWALD: There are only two more brief ones.

6 Exhibit T5, another stipulation:

7 It is hereby stipulated and agreed by and between the  
8 undersigned parties as follows: On July 18, 2012, Ramone  
9 McDermott met with government agents, one of whom took notes  
10 during the meeting. Those notes were not intended to be a  
11 verbatim transcript but were intended to summarize the  
12 substance of McDermott's statements accurately. According to  
13 those notes, McDermott stated in substance and in part that  
14 McDermott overheard Gotti, J-Mark and Bow Wow talking about  
15 robbing Joker's place weeks before it happened. Those same  
16 notes also reflect that during Ramone McDermott's July 18, 2012  
17 meeting with government agents, McDermott stated in substance  
18 and in part that the morning after Joker was killed McDermott  
19 overheard Gucci talking with Gotti and J-Mark about the night  
20 before.

21 We offer Exhibit T5, your Honor.

22 THE COURT: T5 will be received.

23 (Defendant's Exhibit T5 received in evidence)

24 MR. BUCHWALD: Finally, we have the last stipulation,  
25 defendant Thomas Exhibit T6, which reads as follows: It is



E8knchr2

1 hereby stipulated and agreed between the undersigned parties as  
2 follows: On October 8, 2012 Danielle Williams met with  
3 government agents, one of whom took notes at the meeting.  
4 Those notes were not intended to be a verbatim transcript but  
5 were intended to summarize the substance of Williams'  
6 statements accurately. According to those notes, Williams was  
7 shown a photograph of Glenn Thomas which was identical to  
8 Government Exhibit 2002 and Williams identified Thomas as  
9 someone she recognized and had seen before but stated, "Don't  
10 know his name."

11 We offer T6 for identification into evidence as T6.

12 THE COURT: T6 will be received.

13 (Defendant's Exhibit T6 received in evidence)

14 MR. BUCHWALD: Thank you very much, your Honor.

15 THE COURT: Let me meet with the parties at sidebar  
16 very quickly.

17 (At sidebar)

18 THE COURT: I take it there is nothing else. I won't  
19 ask the defendants to rest just now.

20 MR. BUCHWALD: We will state that we rest in front of  
21 the jury.

22 MR. GOLTZER: We have to wait until they talk about --

23 MR. BUCHWALD: Yes.

24 THE COURT: When should I tell the jury to come back.

25 MR. BAUER: I think the charge conference will last

E8knchr2

1 about an hour. What about having them come back at 12:30, with  
2 the idea being we will give them a little more of a break in  
3 the afternoon either between me and Mr. Goltzer or some other  
4 point. With people talking to them the whole afternoon, rather  
5 than a 15-minute break we give them 20 or 30 minutes.

6 THE COURT: I do intend to have snacks for them in the  
7 afternoon so they don't get too upset with us.

8 So you would go from 12:30 to when?

9 MR. BAUER: I think 2:30-ish.

10 THE COURT: OK.

11 MR. BAUER: I won't mind, and I will adhere too it, if  
12 it looks like they are dozing in the middle we can always call  
13 a break in between.

14 MR. GOLTZER: I will fill up the rest of the day.

15 Will you be offended if I leave the charging  
16 conference and work on my summation? Ms. Stafford will do it  
17 very capably.

18 THE COURT: I don't doubt that she will. We will tell  
19 them to come back at 12:30.

20 MR. DRATEL: I think the charge conference will last  
21 more than an hour, but 12:30 is probably OK. It's only 10:10  
22 right now.

23 THE COURT: OK.

24 (In open court)

25 THE COURT: Here's the plan: You can leave now, and

E8knchr2

1 what we want to do is have you back here at 12:30, so you  
2 should actually get something to eat. We will have snacks for  
3 you this afternoon as well so that you don't get too upset with  
4 us. So you can leave now and you can stay in the jury room,  
5 you can go out and enjoy the day, but please, please be in the  
6 jury room no later than 12:30. At 12:30 we will begin with the  
7 government's summation. We will then take a break this  
8 afternoon and then we will begin with the first of the defense  
9 summations. OK. 12:30. Until then, please do not discuss the  
10 case. Be in the jury room at 12:30.

11 (Jury not present)

12 THE COURT: Everyone can be seated. OK.

13 Let's proceed with respect to the jury charge and we  
14 will work off of the draft that we distributed last Friday.  
15 Obviously the first few pages are fairly boilerplate. If there  
16 are any typographical errors or grammatical errors please,  
17 please do point those out to the Court as well.

18 Any comments on the first three instructions or so?  
19 The introductory instructions, the parties, presumption of  
20 innocence, and burden of proof?

21 MR. DRATEL: When you talk about the first  
22 instructions, I don't know how far you mean into it.

23 THE COURT: I am going through page 5.

24 MR. DRATEL: OK. Nothing.

25 MR. NAWADAY: Our first comment isn't until page 36,

E8knchr2

Charge Conference

1 your Honor.

2 THE COURT: Any of the defendants with respect to the  
3 reasonable doubt instruction on pages 6 and 7?

4 MR. DRATEL: No, your Honor.

5 My first comment is on page 8.

6 THE COURT: OK. Let's go to page 8.

7 Mr. Dratel.

8 MR. DRATEL: At the end of the fourth paragraph it  
9 says each count must be considered separately. I would just  
10 add against each defendant or as to each defendant.

11 THE COURT: Any objection?

12 MR. NAWADAY: No objection.

13 THE COURT: So each count must be considered  
14 separately as to each defendant.

15 Anything else on that page?

16 MR. DRATEL: Nothing on that page.

17 THE COURT: Page 9?

18 MR. DRATEL: Nothing.

19 THE COURT: Page 10?

20 MR. DRATEL: Yes, your Honor.

21 In that first paragraph, line 3, end of the sentence,  
22 carries its burden of proof with respect to that charge. I  
23 would say "and that defendant you are considering."

24 THE COURT: I'm sorry. Where are you again?

25 MR. DRATEL: Line 3.

E8knchr2

Charge Conference

1 THE COURT: Yes.

2 MR. DRATEL: There is a sentence that ends in the  
3 middle of the line, with respect to that charge. I would just  
4 add "and that defendant you are considering."

5 MR. NAWADAY: Your Honor, I think your Honor covers  
6 that later on.

7 THE COURT: Yes.

8 MR. NAWADAY: Two sentences later.

9 THE COURT: What I can do is I can move that up, or I  
10 can just say it again it.

11 MR. DRATEL: We also propose a separate instruction to  
12 go right after the multiple counts, consider each defendant  
13 separately. That's the first one that we've proposed.

14 THE COURT: So that language will be added "as to the  
15 defendant you are considering," and then your first proposal is  
16 a separate defendant instruction?

17 MR. DRATEL: Yes.

18 THE COURT: I have reviewed your proposal, and I am  
19 inclined to include the final paragraph of your proposal, which  
20 reads, "In addition, some of the evidence in this case was  
21 limited to one defendant. Let me emphasize that any evidence  
22 admitted solely against one defendant may be considered only as  
23 against that defendant and may not in any respect enter into  
24 your deliberations on any other defendant."

25 MR. NAWADAY: Your Honor. If we can just suggest, if

E8knchr2

Charge Conference

1 your Honor is giving that last paragraph, including that on  
2 page 10, striking "in any respect." I don't think it's  
3 necessary. I think it's clear from what the instruction has  
4 right there what we mean by that.

5 THE COURT: So may not enter into your deliberations  
6 on any other defendant?

7 MR. NAWADAY: Yes.

8 THE COURT: OK. I will grant that. I propose to put  
9 that as the second paragraph on page 10. OK.

10 Anything else on page 10?

11 MR. DRATEL: No, your Honor.

12 THE COURT: Page 11.

13 MR. DRATEL: Again, we have page 2 of our submission  
14 with respect to the counts that relate to the December 14 and  
15 robbery and homicide, we would ask for the instruction that  
16 there has to be specificity of dates with respect to those  
17 counts. That is an essential aspect of this case, and that  
18 variance in dates would not be appropriate in this case because  
19 that would be essentially a variance or an amendment even of  
20 the indictment.

21 THE COURT: Mr. Dratel, you may want to keep your  
22 voice up.

23 MR. DRATEL: Thank you, your Honor. I will move the  
24 mic closer.

25 THE COURT: Mr. Nawaday?

E8knchr2

Charge Conference

1 MR. NAWADAY: First, your Honor, I don't think that's  
2 all correct. Because the conspiracy charge charges in or about  
3 December 2010 is the genesis of the robbery conspiracy. There  
4 was testimony from witnesses that they were thinking, walking  
5 around Newburgh trying to find a stash house. So the inception  
6 of the conspiracy I don't think requires or even or  
7 necessitates specificity about the date.

8 THE COURT: I think certainly with respect to the  
9 conspiracy charges that the request made by the defendants  
10 would not be appropriate. But even with respect to the  
11 substantive charge under the Hobbs Act, I don't believe that  
12 the law requires that the jury be allowed to acquit if the  
13 government doesn't prove that it happened on precisely that  
14 date. All that the law requires in my reading is that there be  
15 substantial similarity of the dates charged in the indictment  
16 and the proof adduced at trial.

17 So what I would be willing to do is to change the  
18 language in my proposed instruction, and I'm reading now from  
19 the third sentence on the third line of page 11, that it is  
20 sufficient if the crimes charged are shown to have been  
21 committed on dates substantially similar to the dates charged  
22 in the indictment.

23 I believe that is all that the law requires.

24 MR. NAWADAY: We agree with your Honor and agree with  
25 your Honor's suggestion.

E8knchr2

Charge Conference

1 MR. DRATEL: Your Honor, we would obviously submit our  
2 charge. We think that allowing any fluidity or change in the  
3 dates would be the kind of moving target that would violate the  
4 defendants' Fifth Amendment rights with respect to a specific  
5 event that the government has alleged in the indictment in the  
6 case, in the evidence. The general principles apply certainly,  
7 but for the purposes of how this case has been tried and  
8 charged, we don't think there's any air there that it should be  
9 permitted.

10 THE COURT: I don't know that it's such an issue  
11 besides. I don't know that there's been any testimony other  
12 than that the robbery took place on December 15 of 2010. Like  
13 I said, all that the law requires, at least with the Second  
14 Circuit, is that there be substantial similarity, not that  
15 there be an identity of dates. So I will use the substantial  
16 similarity language.

17 Anything else on page 11?

18 MR. DRATEL: No, your Honor.

19 THE COURT: Page 12 or 13?

20 MR. DRATEL: Page 13, your Honor, the second element.  
21 It is really a combination of two factors that sometimes are  
22 broken out into three elements, sometimes it appears as the  
23 second element. But I think it's knowingly and willfully.  
24 Elsewhere in the charge willfully appears or intentionally  
25 appears. I think it needs to be harmonized. I think the



E8knchr2

Charge Conference

1 proper term is willfully. And I noted down the road where I  
2 think that it appears otherwise and we can get to those as well  
3 so that they are harmonized. I think it has to be there.

4 THE COURT: Mr. Nawaday?

5 MR. NAWADAY: May I have a moment, your Honor.

6 THE COURT: You do have a willful --

7 MR. DRATEL: Yes. We have provided a willfully  
8 instruction that's standard. I think it took it from the  
9 Court's charge in the most recent trial that I have had.

10 THE COURT: Was that before Judge Forrest?

11 MR. DRATEL: Yes, your Honor.

12 MR. NAWADAY: If I understand what Mr. Dratel wants to  
13 do there, it is just add "willfully."

14 THE COURT: Yes.

15 MR. NAWADAY: That's fine.

16 THE COURT: "Willfully" will be added at page 13. The  
17 prosecution must prove that the defendants knowingly and  
18 willfully became members of the conspiracy.

19 MR. DRATEL: Yes, your Honor. Thank you.

20 THE COURT: OK.

21 We will define willfully later when we discuss element  
22 two or the second element.

23 Anything else on page 13, Mr. Buchwald?

24 MR. BUCHWALD: My apologies, if we could just double  
25 back to page 11 the variance in dates.

E8knchr2

Charge Conference

1 I am concerned, because there has been evidence before  
2 the jury about his October 2007 offense, drug sales, that's  
3 before the jury. I think the government has conceded that  
4 that's not part of the conspiracy charged in our legal  
5 colloquy, and I think that the jury should be specifically  
6 instructed that with respect to that conspiracy, with respect  
7 to Count Three --

8 MR. DRATEL: Three and six. Six is the firearm.

9 MR. BUCHWALD: With respect to the drug conspiracy  
10 alleged here, the drug offense that he was convicted of in  
11 March of 2008 that pertained to the sales in 2007 are not part  
12 of the alleged conspiracy and should not be considered as part  
13 of the alleged conspiracy in this case.

14 MR. NAWADAY: Your Honor, first, your Honor ruled that  
15 we could not put in the evidence 2007 narcotics transaction, so  
16 we didn't do that.

17 What we did put in was the guilty plea transcript, but  
18 the date of that prior drug conviction that the defendant  
19 admitted to during that plea allocution, we didn't put in that  
20 date. As far as I know, Mr. Buchwald put in the conviction,  
21 the judgment of conviction, which has that date, so it only  
22 appears in one place. I am not understanding why we need this  
23 instruction.

24 MR. BUCHWALD: In the guilty plea allocution  
25 Mr. Thomas states he is guilty of the drug sale. He's guilty

E8knchr2

Charge Conference

1 of a gun possession and a prior drug sale. Unless we put in  
2 what we are talking about, in other words, 2007 events to 2008,  
3 the jury would believe that that drug sale had occurred anytime  
4 between 2008 and 2012, which it didn't. So we had to put that  
5 in to make it clear which drug possession you are talking  
6 about.

7 The government has conceded from the get-go in its  
8 papers that that 2007 drug sale while he was a member of the  
9 Crips is not part of the conspiracy which they are alleging.  
10 They have made that specific concession in their legal papers.  
11 The jury should not be allowed, especially by virtue of this  
12 variance in dates charge, to consider that as part of the  
13 alleged conspiracy.

14 THE COURT: I'm sorry. Someone is going to have to  
15 remind me what evidence was put before the jury concerning that  
16 prior drug sale. When was it?

17 MR. BUCHWALD: The arrest occurs in March of 2008, and  
18 it pertains to his offense in October of 2007.

19 THE COURT: What date does the indictment charge in  
20 terms of the drug conspiracy?

21 MR. BUCHWALD: 2008 through 2012.

22 THE COURT: OK.

23 Was that before the jury? What evidence was placed  
24 before the jury about that?

25 MR. BUCHWALD: They introduced evidence of his guilty

E8knchr2

Charge Conference

1 plea allocution. In the guilty plea allocution he says,  
2 remember, the charge there was possession of a weapon as a  
3 prior convicted felon. In the guilty plea allocution  
4 Mr. Thomas says, I possessed the weapon. Your Honor inquires  
5 about the prior felony. He says, Yes, I sold drugs and got two  
6 years I think was his response.

7 So that didn't have a date attached to it as to when  
8 he sold the drugs, but that left everything totally pregnant,  
9 because this guilty plea allocution is in 2012 I guess.

10 So we put in in the stipulation the fact that that  
11 drug offense was in 2007 and he pled guilty to it in 2008 in  
12 order to make it clear to the jury that we are not talking  
13 about some drug offense that occurred in this relevant time  
14 period. We can do that safely because the government has  
15 previously stipulated in its legal papers that that was not  
16 part of this conspiracy. That occurred at a time when he was a  
17 member of the Crips.

18 THE COURT: OK. Mr. Nawaday?

19 MR. NAWADAY: Your Honor, I'm still not understanding  
20 what the confusion is.

21 THE COURT: I guess the confusion is that now there is  
22 arguably before the jury evidence that Mr. Thomas as a  
23 predicate for his arms offense committed a drug trafficking  
24 crime in 2007. Mr. Buchwald wants to make sure that the jury  
25 does not consider that 2007 predicate as evidence of the

E8knchr2

Charge Conference

1 narcotics charges in this indictment. Did I summarize that  
2 accurately, Mr. Buchwald?

3 MR. BUCHWALD: Your Honor, it should not be considered  
4 as evidence, nor should it be considered as part of the drug  
5 conspiracy which the government alleges in this case.

6 MR. NAWADAY: First off, I don't think it's in the  
7 variance of dates section that that can be dealt with or should  
8 be dealt with, because it's confusing. Maybe a limiting  
9 instruction where your Honor already has a limiting instruction  
10 later on that certain evidence was only admitted for  
11 background. We can say that, you know, a limiting instruction,  
12 to the extent that you heard evidence about a 2007 narcotics  
13 conspiracy charge that Mr. Thomas pleaded guilty, you can't  
14 consider that as all.

15 THE COURT: I think that's right. I think maybe later  
16 when we are discussing the actual conspiracy, what evidence  
17 they can consider in terms of establishing or not the  
18 defendant's participation in the conspiracy. In other words,  
19 we'll get it in there, it is a matter of where.

20 MR. BUCHWALD: I hear you, but I think that will do it  
21 perhaps if you flash back at that point.

22 THE COURT: I don't want to say that.

23 MR. BUCHWALD: I'm concerned here because the variance  
24 in dates seems to be a suggestion, if it's late '07 --

25 THE COURT: Mr. Buchwald, I appreciate that it is a

E8knchr2

Charge Conference

1 valid point. It would require a very sort of --

2 MR. BUCHWALD: I agree, your Honor.

3 MR. DRATEL: Your Honor, also, if we argue that, if I  
4 put a sentence in there, the government is not going to in  
5 rebuttal suggest otherwise, right?

6 MR. NAWADAY: Of course not.

7 MR. DRATEL: If I say you can't count that?

8 THE COURT: Absolutely.

9 MR. DRATEL: I am not going to get contradicted?

10 THE COURT: Correct.

11 MR. DRATEL: Thank you.

12 THE COURT: We were on page 13.

13 MR. DRATEL: Yes.

14 THE COURT: Anything more on 13?

15 MR. DRATEL: No, your Honor.

16 THE COURT: Robbery conspiracy, first element,  
17 existence of the conspiracy. Anything more on that?

18 MR. DRATEL: Just the first paragraph, i, the last  
19 sentence. We would just ask that that last sentence be deleted  
20 about a formal document or specific oral agreement. I know  
21 that this is part of a traditional conspiracy charge. I think  
22 it directs the jury in a way that is inappropriate as to what  
23 the evidence ought to be or what they should consider  
24 sufficient.

25 THE COURT: Mr. Nawaday?

E8knchr2

Charge Conference

1 MR. NAWADAY: Your Honor, this is a standard charge.  
2 I think it's helpful to the jury.

3 THE COURT: I am familiar with this charge going back  
4 to 1993, so I'm not going to take it out. I'm sure it was in  
5 there before 1993. I'm just familiar.

6 MR. DRATEL: Someday.

7 THE COURT: Page 15.

8 MR. DRATEL: 15, your Honor, the full paragraph, the  
9 one beginning, "in determining whether."

10 THE COURT: Yes.

11 MR. DRATEL: The sentence that begins, "Often the only  
12 evidence," I think this is even more so than the prior point,  
13 which is I think that just suggests, it changes the  
14 government's burden as to what their -- I would change it as to  
15 what their evidentiary burden is, I would change it. I would  
16 delete everything up to "disconnected," and I would start with  
17 the word "disconnected" and then just, "disconnected acts,"  
18 delete the word, "that so it would read "disconnected acts,  
19 when taken together in connection with one another," and I  
20 would add the word can, "can show a conspiracy or an agreement"  
21 and then continue the sentence.

22 I think that's fairer than suggesting to the jury what  
23 an ordinary case would be and what they could find from. I  
24 just think it's to suggestive otherwise as to what the jury's  
25 standard ought to be, and I think it changes the government's

E8knchr2

Charge Conference

1     burden.

2             THE COURT: I am inclined to make that change.

3             Mr. Nawaday, any objection.

4             MR. NAWADAY: No, your Honor. If Mr. Dratel can  
5     repeat what he just said.

6             MR. DRATEL: That the sentence, it should start with  
7     disconnected, "Disconnected acts, when taken together in  
8     connection with one another, can show a conspiracy or an  
9     agreement to secure a particular result just as satisfactorily  
10    and conclusively as more directly."

11            MR. NAWADAY: Thank you.

12            THE COURT: That change will be made.

13            MR. DRATEL: Thank you, your Honor.

14            THE COURT: Anything else on page 15?

15            MR. DRATEL: I don't have anything until page 18, your  
16    Honor.

17            MR. GREENFIELD: Your Honor, I have one observation on  
18    page 16. Second full paragraph, third line, robbery or  
19    robberies.

20            THE COURT: I'm sorry. Start again and keep your  
21    voice up. Where are you?

22            MR. GREENFIELD: This is in the second paragraph on  
23    the page, the second full paragraph, third line, it says,  
24    "Robbery or robberies in the manner charged in Count One."

25            There is only one robbery charged in this count.



E8knchr2

Charge Conference

1 That's the December 15 robbery. So I would ask that the word  
2 robberies be removed.

3 THE COURT: Any objection?

4 MR. NAWADAY: No objection.

5 THE COURT: "Or robberies" will be taken out.

6 MR. DRATEL: Page 18 then?

7 Yes. The second paragraph, your Honor. I think it  
8 should be knowingly and willfully to harmonize it.

9 THE COURT: The second sentence? The second line  
10 there?

11 MR. DRATEL: Yes. In other words, just add willfully  
12 there.

13 THE COURT: Knowingly, willfully, and intentionally?

14 MR. DRATEL: Yes.

15 THE COURT: OK.

16 MR. DRATEL: I think that's where we also define  
17 willfully because we define the other terms here as well.

18 THE COURT: We'll put that willful definition that you  
19 provide. Does it makes sense to put that after the paragraph  
20 defining knowingly and intentionally.

21 MR. DRATEL: Yes, your Honor.

22 THE COURT: OK.

23 MR. NAWADAY: If I may suggest, your Honor, it may be  
24 more efficient to just add, "An act is done knowingly and  
25 intentionally and willfully, and then leave the remainder of

E8knchr2

Charge Conference

1 your Honor's instruction there because what Mr. Dratel suggests  
2 is basically the same of what willfully is.

3 THE COURT: That appears to make sense.

4 MR. DRATEL: OK.

5 THE COURT: OK?

6 MR. DRATEL: Yes.

7 THE COURT: We will add the word "willfully" to that  
8 paragraph.

9 MR. DRATEL: My next comment is page 20.

10 THE COURT: Yes.

11 MR. DRATEL: The last paragraph, again, add  
12 "willfully."

13 THE COURT: OK.

14 MR. DRATEL: Also in the prior paragraph, I think  
15 between the prior paragraph and the last paragraph, in other  
16 words, before "in sum," would be a place to add the mere  
17 association instruction that we have proposed. We think it's  
18 important in this case because of a couple of factors, one of  
19 which is the extensive evidence about gang activity that is not  
20 the conspiracy.

21 THE COURT: Yes. I am inclined to include language  
22 along the lines that was requested. I think that there has  
23 been substantial testimony in this case by a number of the  
24 cooperating witnesses about the defendants' association with  
25 one or more gangs, so I do think that it makes sense to add the

E8knchr2

Charge Conference

1 instruction that Mr. Dratel requests.

2 Mr. Nawaday.

3 MR. NAWADAY: We have no objection to that.

4 THE COURT: Very well.

5 MR. GREENFIELD: Judge, on page 20 I have an  
6 observation also.

7 THE COURT: Let's finish up this one point unless it  
8 relates to --

9 MR. GREENFIELD: I'm sorry.

10 THE COURT: I just want to make sure that we are all  
11 agreed as to what the language is and where it should go.

12 Where did you suggest it would go?

13 MR. DRATEL: Your Honor, just before that last  
14 paragraph, in sum. In other words, you have the kind of mere  
15 presence instruction, the paragraph, and then below that.

16 THE COURT: Very well. We will put that there.

17 Mr. Greenfield.

18 MR. GREENFIELD: Yes, Judge.

19 On page 20, the first full paragraph at the end,  
20 following the Sand instruction 19-6, I would ask that the  
21 following or similar language be added, It is important for you  
22 to note that the defendant's participation in the conspiracy  
23 must be established by independent evidence of his own acts or  
24 statements as well as that of the alleged coconspirators.

25 That follows the language in Sand 19-6.

E8knchr2

Charge Conference

1 THE COURT: Again, I want you to keep your voice up,  
2 Mr. Greenfield.

3 Where are you? You are at the paragraph that begins  
4 "The duration"?

5 MR. GREENFIELD: The duration and extent, yes, Judge.

6 THE COURT: And did you provide language?

7 MR. GREENFIELD: I just did.

8 THE COURT: Are you just reading something now?

9 MR. GREENFIELD: I am just reading something out,  
10 Judge. It's from Sand, as I said.

11 THE COURT: What is it that you want to include and  
12 where?

13 MR. GREENFIELD: At the end of that paragraph, "It is  
14 important for you to note that the defendants' participation in  
15 the conspiracy must be established by an independent evidence  
16 of his own acts or statements as well as any acts and  
17 statements of alleged coconspirators."

18 THE COURT: Mr. Nawaday?

19 MR. NAWADAY: Could I could just briefly confer with  
20 Mr. Greenfield.

21 Your Honor, I will defer to Sand on that one.

22 THE COURT: OK.

23 We'll check, but would you mind reading that slowly,  
24 Mr. Greenfield?

25 MR. GREENFIELD: Yes, Judge.

E8knchr2

Charge Conference

1           It is important for you to note that the defendants'  
2 participation in the conspiracy must be established by  
3 independent evidence of his own acts or statements as well as  
4 of those of the other alleged coconspirators."

5           THE COURT: OK. So that would be at page 20 at the  
6 end of the paragraph that begins "the duration and extent."

7           MR. GREENFIELD: Again, Judge, at the bottom of the  
8 page, the next to the last line, the same as before, robbery  
9 and robberies. I would ask for the "or robberies" to be  
10 deleted.

11          THE COURT: Any objection?

12          MR. NAWADAY: No objection.

13          THE COURT: "Or robberies" will be deleted.

14          Anything else on page 20 or 21?

15          MR. DRATEL: No, your Honor.

16          THE COURT: Page 22 or 23?

17          MR. DRATEL: With respect to page 23, I think, and the  
18 Court does cover this at page 40 to some extent, but we think  
19 it just needs to be reinforced here as well so that the jury  
20 doesn't get the wrong impression in the sense that while this  
21 is an accurate statement of the law, I think it has the  
22 capacity to be misinterpreted in this sense, in that, as the  
23 Court notes at page 40, whether the defendant is in fact a  
24 participant in the conspiracy is based on the defendant's own  
25 actions and conduct and not necessarily the statements or

E8knchr2

Charge Conference

1 actions of the coconspirators.

2 THE COURT: Didn't we just cover that at page 20?  
3 That's what Mr. Greenfield just provided.

4 MR. DRATEL: I think it also includes coconspirator's  
5 conduct in that statement. I think the Court may be correct,  
6 though, in that regard.

7 THE COURT: Yes.

8 MR. DRATEL: I didn't have that in my notes. I have  
9 it here.

10 THE COURT: OK. Page 24 or 25?

11 MR. DRATEL: 25, just in the fourth element, it needs  
12 willfully I think as well.

13 THE COURT: Does that apply to robbery as well,  
14 Mr. Nawaday?

15 MR. NAWADAY: Yes, your Honor. Since we have been  
16 harmonizing, that's fine.

17 THE COURT: OK. 26?

18 MR. DRATEL: Nothing from us.

19 THE COURT: 27?

20 MR. DRATEL: 27, with respect to the first paragraph,  
21 we would ask the Court to, I think the jury would have to be  
22 unanimous as to the means. In other words, force, violence or  
23 fear. Some jurors couldn't think force, some couldn't think  
24 violence, some couldn't think fear. They would have to be  
25 unanimous as to the element in that regard.

E8knchr2

Charge Conference

1 THE COURT: I don't think that's the law.

2 Mr. Nawaday?

3 MR. NAWADAY: I don't believe that's accurate either,  
4 your Honor.

5 THE COURT: I will not make that change.

6 MR. DRATEL: In the last paragraph, your Honor, the  
7 second-to-last line. I think the "should" should be changed to  
8 "may."

9 "But a careful consideration of the circumstances and  
10 evidence may make you to decide whether" rather than "should."

11 THE COURT: I just want to read the entire paragraph.

12 MR. DRATEL: Sure.

13 THE COURT: I think that is an appropriate  
14 recommendation.

15 MR. DRATEL: Thank you, your Honor.

16 MR. NAWADAY: No objection.

17 THE COURT: So "may enable" will be changed to "should  
18 enable."

19 28?

20 MR. DRATEL: No. Nothing, your Honor.

21 THE COURT: 29?

22 MR. DRATEL: Nothing.

23 THE COURT: Attempt.

24 MR. DRATEL: Yes, your Honor. We have proposed some  
25 additional language with respect to attempt that we think is

E8knchr2

Charge Conference

1 appropriate. It comes from the Second Circuit's decision in  
2 *Farhan* from a couple of years ago. Obviously, it's based on  
3 pre-existing Second Circuit precedent.

4 THE COURT: Yes.

5 So the additional language that you are requesting  
6 involves, I will read it, "A verbal agreement without more is  
7 insufficient for the substantial step requirement. The acts of  
8 a person who intends to commit a crime will constitute the  
9 attempt or the acts themselves indicate intent to commit the  
10 crime willfully and the acts are a substantial step in the  
11 course of conduct planned to culminate in the commission of the  
12 crime."

13 MR. DRATEL: Yes, your Honor.

14 THE COURT: OK. Go ahead.

15 MR. DRATEL: I would put that, actually you have some  
16 of that language in at the end of 31 beginning of 32. I think  
17 you have most of that last sentence as I look here. But would  
18 either begin it with that last sentence or verbal agreement,  
19 put it there.

20 THE COURT: By the last sentence, you mean the last  
21 sentence in which paragraph?

22 MR. DRATEL: It's the last sentence on page 31.

23 THE COURT: All right.

24 MR. DRATEL: I see here that, for some reason I missed  
25 it, that you actually have the second sentence of my proposed



E8knchr2

Charge Conference

1 charge already in there. In other words, clearly indicate an  
2 intent to willfully, you have got that sentence. Really all we  
3 need is the verbal agreement sentence, the first sentence,  
4 which I would put right before "put another way."

5 THE COURT: OK.

6 MR. DRATEL: Thank you, your Honor.

7 THE COURT: Mr. Nawaday, I'm inclined to include this.  
8 Do you have an objection?

9 MR. NAWADAY: No, your Honor, I agree with Mr. Dratel  
10 that your Honor's instruction has portions of it already.

11 THE COURT: Very well. That change will be made. We  
12 will include that first sentence and we will put it in a way  
13 that flows. OK. 33.

14 MR. DRATEL: Your Honor, just 32.

15 THE COURT: OK.

16 MR. DRATEL: The very last clause, iv, I just think  
17 "willfully" needs to be added there.

18 THE COURT: Very well.

19 MR. DRATEL: 33 nothing.

20 THE COURT: 35?

21 MR. DRATEL: Well, your Honor, somewhere in there we  
22 would like our multiple conspiracies and single act instruction  
23 that we have proposed. I am not sure where the Court would  
24 want to put it. I thought between pages 34 and 35.

25 THE COURT: Let's just take the concept generally of

E8knchr2

Charge Conference

1 multiple conspiracies.

2 Mr. Nawaday, does the government have a view as to  
3 whether or not would be should be included?

4 MR. NAWADAY: We don't think the multiple conspiracy  
5 charge should be included here. We think the evidence has  
6 shown that we have a single conspiracy with respect to both the  
7 robbery conspiracy that is charged and with respect to the  
8 narcotics conspiracy that is charged.

9 I can run through that now for your Honor. It is  
10 Mr. Dratel's application of why he believes there is multiple  
11 conspiracies and the charge is appropriate.

12 THE COURT: Let's go to you Mr. Dratel.

13 MR. DRATEL: Sure. I think the government's  
14 conspiracy is anyone selling drugs in Newburgh is a  
15 coconspirator. I think that's the way they presented the  
16 evidence, just very disparate, somebody selling here, there are  
17 a bunch of sellers on the corner, none of them have any  
18 allegiance to each other or agreement with each other, other  
19 than on a sporadic isolated going for a split or a reup or  
20 something like that. It's not definitive. It doesn't define a  
21 conspiracy.

22 There are no organizational aspects of any conspiracy,  
23 while obviously not required necessarily, but what we have here  
24 is a -- and time frames we don't have other than let's say,  
25 Mr. McDermott doesn't necessarily have a coconspirator at all

E8knchr2

Charge Conference

1 selling marijuana except perhaps Pablo he pays money to for  
2 that purpose. He has money Monday and Wednesday. Everything  
3 else is completely haphazard, completely random, and in some  
4 ways spontaneous.

5 So the concept of a unitary conspiracy is completely  
6 belied by the evidence, which is potentially a vast number of  
7 small conspiracies. I mean, let's put it this way. It is at  
8 least as reasonable a view of the evidence that it is a vast  
9 number of small conspiracies as it is the government's version  
10 of a unitary conspiracy, which hasn't been established at all  
11 in our view of the evidence.

12 THE COURT: Mr. Nawaday?

13 MR. NAWADAY: Your Honor, we presented evidence of a  
14 single conspiracy. The conspirators are L-1, Kev Gotti,  
15 J-Mark, Reckless, Gucci, Bow Wow and Bash, essentially the crew  
16 that robbed 54 Chambers Street. They went there to rob that  
17 stash house for drugs so they could sell the drugs.

18 In addition to that, they were working together, those  
19 people, prior to that, the robbery of 54 Chambers. You have  
20 heard evidence that Jamar Mallory and L-1 were business  
21 partners. They sold out of the same house and served each of  
22 their customers crack cocaine.

23 You have heard testimony from Jamar Mallory that he  
24 gave drugs to Gucci to sell and that when Gucci would come up  
25 to him on the street, sometimes Gucci would ask, Hey, can I

E8knchr2

Charge Conference

1 take your customer. So do me that favor. And Jamar Mallory  
2 would allow him to do that. There is an agreement right there  
3 as part of a conspiracy to sell drugs together when they're out  
4 there.

5 There was also testimony from Danielle Williams that  
6 L-1 was supplying Bow Wow with drugs, with crack cocaine, and  
7 how Danielle Williams said that she overheard Bow Wow and Bash  
8 talking about how they have to go reup from L-1.

9 Also there was testimony about how Reckless directed  
10 Bow Wow to sell to a customer while on that porch at 38 Dubois  
11 Street where L-1 hung out and how on another occasion L-1 --

12 THE COURT: I'm sorry. Testimony that Reckless  
13 directed who to do what?

14 MR. NAWADAY: Bow Wow, that a crack cocaine customer  
15 came to 38 Dubois Street, that white and blue house on Dubois  
16 Street where L-1 has been seen hanging out with Reckless and  
17 Bow Wow, and a crack cocaine customer came there and Reckless  
18 directed that customer to Bow Wow for Bow Wow to serve that  
19 customer.

20 So that is a conspiracy. That's the evidence we've  
21 shown. To the extent that there was evidence of how it worked  
22 on those streets, the different people selling on those  
23 streets, that's just evidence to show that this conspiracy we  
24 have alleged between these people, how it worked. That goes to  
25 the existence, whether we have proven the existence of the

E8knchr2

Charge Conference

1 conspiracy we have alleged, not whether there are multiple  
2 conspiracies that have been charged.

3 MR. DRATEL: Your Honor, that is a view of the  
4 evidence that is the government's theory, and they will marshal  
5 the evidence as they see fit in front of the jury. But that is  
6 not the exclusive view of the evidence. Certainly when  
7 Mr. Thomas, just taking the evidence at face value,  
8 Mr. Mallory's testimony, that Mr. Thomas comes up to him and  
9 says I would like to borrow some money, Mr. Mallory says, well,  
10 I don't have money, but I have some crack for you to sell.

11 To the extent that proves the conspiracy charged in  
12 the indictment, it is really a far flung matter all together.  
13 So it may prove a very, very discrete, separate conspiracy than  
14 the one charged in the indictment, but I think that a lot of  
15 the evidence goes to that same context, which is sporadic,  
16 isolated pieces of evidence that don't have a course of conduct  
17 that would be consistent with the larger conspiracy -- and the  
18 government can marshal the evidence and say otherwise, but I  
19 think that the evidence fairly viewed includes both of those  
20 possibilities, and I think the jury needs to be charged with  
21 respect to them.

22 THE COURT: Mr. Strazza?

23 MR. STRAZZA: I join in Mr. Dratel's comments with  
24 respect to the narcotics conspiracy charged here. And I just  
25 want to say specifically with respect to Mr. Christian there

E8knchr2

Charge Conference

1 was very limited testimony about isolated events, again, where  
2 specifically the reference right now to the incident with Bow  
3 Wow, I submit that that is certainly in no way evidence of the  
4 conspiracy that Mr. Christian was involved in with all of the  
5 people the government just mentioned.

6 Yesterday they mentioned an incident where  
7 Mr. Christian went with Mr. Mallory or where Mr. Mallory  
8 approached Mr. Christian and asked him where he could find more  
9 crack and Mr. Christian took him and the two of them purchased  
10 crack from the same person.

11 But the testimony with respect to that incident was  
12 very clear when I went back last night and read the record.  
13 They both made their own separate purchases from that same  
14 individual.

15 Even if in the light viewed most favorable to the  
16 government that is considered to be a conspiracy amongst  
17 Mr. Mallory and Mr. Christian, I still don't see how it goes to  
18 prove or how it shows the competent existence of the conspiracy  
19 alleged in the indictment.

20 Again, I understand each side is entitled to their own  
21 arguments, but I don't think the evidence is strong enough or  
22 sufficient enough where we shouldn't argue, where the jury  
23 shouldn't be charged about multiple conspiracies.

24 MR. DRATEL: I think this very much on a smaller scale  
25 is analogous to the situation in *Bertolotti*, where you had a

E8knchr2

Charge Conference

1 lot of competing small organizations that sometimes overlapped,  
2 sometimes didn't. Sometimes they competed with each other and  
3 sometimes operated independently. Going beyond the Rule 29  
4 point right now, we are really talking about whether the  
5 government's theory is the exclusive theory that gets presented  
6 to the jury.

7 THE COURT: Mr. Nawaday, did you want to respond?

8 MR. NAWADAY: Just briefly, your Honor. Again, it  
9 sounds like Mr. Strazza is arguing, what Mr. Dratel is arguing  
10 is whether we have proven the existence of a conspiracy, not,  
11 you know, that there are these multiple conspiracies out there.

12 THE COURT: I think I agree with the defense. I think  
13 that it is appropriate in this case to give a multiple  
14 conspiracy instruction.

15 There was certainly a lot of evidence elicited by the  
16 government actually concerning the way in which the drug  
17 dealers conducted their business on the street. There was  
18 testimony I recall that at times there would be as many as five  
19 or six or ten drug dealers at a time and that they would help  
20 each other out. There was a lot of testimony elicited by the  
21 government concerning splits.

22 I don't recall that each of those splits or each of  
23 those instances occurred with an individual that was named in  
24 the conspiracy or that was alleged to have been part of the  
25 conspiracy.

E8knchr2

Charge Conference

1           Also, there was a lot of discussion concerning how  
2 this took place over a number of years and at various  
3 locations. There did not appear to be a single source of  
4 narcotics for any of these participants that are alleged to  
5 have participated in the conspiracy.

6           I do believe, consistent with the commentary to the  
7 multiple conspiracy charge in Sand, that if a reasonable juror  
8 could in light of the evidence adduced find that either one  
9 common overall plan or several separate and independent  
10 unlawful agreements existed, the trial court should instruct  
11 the jury regarding the issue of multiple conspiracies.

12           That only takes us half of the way. The balance of  
13 the route that we need to take is what language we should use.  
14 In that regard I don't believe that the language proposed by  
15 the defendants is appropriate.

16           In particular, the defendants want me to charge the  
17 jury "If instead you find that the government has proven  
18 multiple conspiracies or a series of smaller conspiracies  
19 rather than the single conspiracy alleged in the indictment,  
20 you must acquit."

21           I think that what the case law requires is that once  
22 the jurors are instructed on multiple conspiracies that they  
23 need to find that the actual conspiracy charged in the  
24 indictment was proven by the government and in that regard the  
25 language in *Restrepo*; which is reported at 547 F.App'x 34,



E8knchr2

Charge Conference

1 which reads as follows, pages 40 to 41: "You must decide  
2 whether the conspiracy charged in the indictment existed, and,  
3 if it did, who were some of its members. If you find that the  
4 conspiracy charged did not exist, then you must return a  
5 not-guilty verdict, even though you may find that some other  
6 conspiracy existed. Similarly, if you find that the defendant  
7 was not a member of the conspiracy charged, then you must find  
8 the defendant not guilty even though the defendant may have  
9 been a member of some other conspiracy."

10 This is a case from 2013.

11 So I will craft language consistent with that  
12 decision, which was approved by the Second Circuit, and will  
13 not otherwise use the entirety of the request that was provided  
14 by Mr. Thomas.

15 MR. DRATEL: Your Honor, that leaves the single  
16 transaction rule, which also is the following instruction on  
17 page 7 of what we proposed.

18 MR. NAWADAY: Your Honor, before we get there, can I  
19 just confirm that that charge relating to multiple conspiracies  
20 only relates to narcotics conspiracy count and does not relate  
21 to the robbery conspiracy count, Count One, since the  
22 defendants' proposed charge seems to indicate it applied to all  
23 counts.

24 THE COURT: Yes.

25 Seeing that we have taken the "or robberies" language

E8knchr2

Charge Conference

1 out, I think that is appropriate.

2 MR. DRATEL: Yes, your Honor.

3 THE COURT: OK. And with respect to the single act.

4 MR. DRATEL: Yes.

5 THE COURT: Go ahead, Mr. Dratel.

6 MR. DRATEL: Well, again, this is a principle from a  
7 Second Circuit cases going back a long ways, that a single act  
8 on its own is not sufficient to establish the defendant's  
9 participation in a conspiracy. And since a conviction of  
10 conspiracy requires an intent to participate in an unlawful  
11 enterprise, a single act must be such that one may reasonably  
12 infer from it an intent to participate in the enterprise. So  
13 that's the essence of it.

14 I think it dovetails with what we previously  
15 discussed, which is that the simple fact that two people may  
16 have acted together in a single instance does not  
17 necessarily -- again, the government can marshal its evidence  
18 and we can marshal ours to the extent that we argue it, but  
19 just that the single act does not evince an intent to be part  
20 of that larger conspiracy.

21 I think they go hand in hand in this regard because  
22 the evidence just shows so many disparate people, our position  
23 is that a simple act on its own is not indicative of this  
24 larger conspiracy or the participation in it of particular  
25 individuals.

E8knchr2

Charge Conference

1 Obviously, the testimony doesn't include a  
2 confederation by a specific defendants here in the sense of  
3 some of the defendants together are not linked with respect to  
4 any sales, but they are linked to other people.

5 THE COURT: I'm sorry. Are we talking specifically  
6 about the narcotics conspiracy?

7 MR. DRATEL: Yes. We are talking about the narcotics  
8 conspiracy.

9 THE COURT: OK.

10 Mr. Nawaday?

11 MR. NAWADAY: Your Honor, I don't think this  
12 instruction is necessary or appropriate. I think it's actually  
13 a little confusing, and I actually think that what  
14 Mr. Greenfield suggested your Honor add earlier on actually  
15 takes care of this issue in some ways to the extent there is  
16 one.

17 (Continued on next page)  
18  
19  
20  
21  
22  
23  
24  
25

E8k9chr3

1 THE COURT: Anything further?

2 MR. DRATEL: No, your Honor.

3 THE COURT: Not going to give this instruction.

4 MR. BUCHWALD: Just in that respect, your Honor, I  
5 don't mean to be repetitive. The conspiracy charged we believe  
6 by definition in this case is more than the drugs that are  
7 involved on December 15 of 2010. That was their original  
8 charge. They have a superseding indictment which makes it more  
9 than that. And our concern is that without a charge like this  
10 they can be found guilty of that narcotics conspiracy if the  
11 only thing that happened was an attempted robbery of drugs on  
12 December 15, 2010. Clearly they've indicted more. Their  
13 conspiracy is more than that.

14 THE COURT: As I indicated, I'm not going to give this  
15 charge. I think that the consistent with Second Circuit  
16 authority. I'm speaking in particular about U.S. v. Heras, 609  
17 F.3d 101 at pages 108 and 110 through '11 as well as United  
18 States v. Huezio, 546 F.3d 174, at pages 179 through '80; that  
19 that particular request would be inappropriate. So I'm not  
20 going to give that instruction.

21 So we will give the multiple conspiracy. We won't  
22 give the single transaction instruction.

23 Anything further on page 35?

24 MR. DRATEL: Also, your Honor, pointed out to me by  
25 cocounsel, it would have to be conformed with the government's

E8k9chr3

1 announcement yesterday that it was going to submit to the jury  
2 only (b)(1)(C) and not (b)(1)(A).

3 THE COURT: Yes. That change will be made when we  
4 read the count on page 33.

5 MR. BUCHWALD: Page 36.

6 MR. DRATEL: Also page 33 we get to the quantity. But  
7 before we get to quantity there's one paragraph on page 35.

8 Page 35, the last full paragraph. "Let me note that  
9 the government need prove only that a defendant conspired to  
10 distribute a controlled substance but that he conspired to  
11 possess a controlled substance with the intent to distribute  
12 it. The government need not do both." But I think there needs  
13 to be unanimity as to the controlled substance with respect to  
14 each defendant. I know it complicates it, but I think it's  
15 necessary, given that the circuit has held that drug type is an  
16 element of the offense. So I think for drug type for each  
17 defendant that's -- if eight jurors feel that Mr. Thomas sold  
18 crack and four say he sold marijuana, I don't think that's a  
19 sufficient verdict in that regard. I think they have to be  
20 unanimous as to each defendant as to the specific drug.

21 THE COURT: Mr. Nawaday.

22 MR. NAWADAY: Your Honor, I think that what Mr. Dratel  
23 is suggesting is accurate. We can, at break, send you some  
24 proposed language to cover that or cover that in the verdict  
25 form.

E8k9chr3

1 THE COURT: Okay. Very well. But do get me that  
2 language just as soon as you can because there is a logistical  
3 issue that we need to address, I guess, in terms of getting it  
4 altogether and copied, etc.

5 MR. NAWADAY: Yes, your Honor.

6 THE COURT: Now, with respect -- anything more on page  
7 35?

8 MR. DRATEL: No, your Honor.

9 MR. NAWADAY: Your Honor, the government's first  
10 comment is on page 36.

11 THE COURT: Page 36.

12 MR. NAWADAY: Based on the government's motion to  
13 proceed just on a (b)(1)(C) the government suggests deleting  
14 the last paragraph on page 36.

15 THE COURT: The last paragraph being, "As I will  
16 explain later"?

17 MR. NAWADAY: Yes. "You will then be asked to make a  
18 finding about quantity."

19 THE COURT: But the language otherwise in that  
20 section, Section iii, is appropriate?

21 MR. NAWADAY: Yes.

22 THE COURT: Okay. Defendants agree?

23 MR. DRATEL: Well, it's a correct statement.

24 THE COURT: Very well. So the last paragraph on page  
25 36 will be deleted.

E8k9chr3

Page 37.

MR. DRATEL: Nothing on page 37, your Honor. On 38.

THE COURT: Page 39?

MR. DRATEL: That full paragraph, your Honor, I would just -- I would start it, rather than "often" I would say "it may be possible."

THE COURT: Any objection?

MR. NAWADAY: No, your Honor.

MR. DRATEL: At the end of the paragraph I would say "from all of the evidence" and I would just add "or lack of evidence presented in this case."

THE COURT: So that paragraph will begin, "it may be possible to make the determination from all of the evidence or lack of evidence"?

MR. DRATEL: Yes, your Honor.

THE COURT: Any objection?

MR. NAWADAY: No objection.

THE COURT: So that change will be made as well.

Page 40.

MR. DRATEL: Essentially summarizing the elements, your Honor, that the Court has previously defined for the jury. I would just add the further paragraph, line 3, and that is whether the defendants participated in a conspiracy, I would just add "willfully" with knowledge of its unlawful purpose.

MR. NAWADAY: No objection.

E8k9chr3

1 THE COURT: Okay.

2 MR. DRATEL: And also the last paragraph where it says  
3 "knowing and intentionally" I would add "willfully" as well.

4 THE COURT: Okay. Very well.

5 MR. DRATEL: Yes. I'm sorry, your Honor.

6 THE COURT: Go ahead.

7 MR. DRATEL: In that first paragraph Ms. Stafford  
8 points out line 3, it says "defendants" and it should say "the  
9 defendant you are considering."

10 MR. NAWADAY: No objection.

11 THE COURT: Okay.

12 MR. NAWADAY: Page 41 should be deleted, your Honor.

13 THE COURT: This entire instruction should be deleted?

14 MR. NAWADAY: Yes, your Honor. This is the special  
15 interrogatory on drug quantity.

16 THE COURT: Okay.

17 MR. DRATEL: We agree, your Honor.

18 THE COURT: Page 42.

19 MR. DRATEL: Nothing, your Honor.

20 THE COURT: 43.

21 MR. DRATEL: No, your Honor.

22 MR. NAWADAY: 43, your Honor. The second element at  
23 the end it says in relation to the specified crime "for"  
24 violence I think it should be "of" violence.

25 THE COURT: Yes. I'm sorry. Should be -- was there a



E8k9chr3

1 change?

2 MR. NAWADAY: Yes, your Honor. The version I had it  
3 says during and in relation to the specified crime "for"  
4 violence.

5 MR. DRATEL: I have "of."

6 THE COURT: You mean the second line?

7 MR. NAWADAY: Where it says, "Second, that the  
8 defendants used or carried firearms during and in relation to  
9 the specified crime," should be "of" violence.

10 THE COURT: Got it. Was this the second element, the  
11 second line, the last -- the word before violence should be  
12 "of" violence not "or" violence.

13 Anything else on 43?

14 MR. NAWADAY: Not from the government.

15 MR. DRATEL: Nothing, your Honor.

16 THE COURT: 44.

17 MR. DRATEL: No, your Honor.

18 MR. NAWADAY: The third line after the section labeled  
19 "use."

20 THE COURT: Yes.

21 MR. NAWADAY: The third line reads, "In relation to  
22 the commission of the," it says "drug trafficking crime." It  
23 should be "crime of violence" since this count relates to the  
24 robbery.

25 THE COURT: Okay. So "drug trafficking crime" will be

E8k9chr3

1 removed and "crime of violence" will be put in its place.

2 Anything else on 44?

3 MR. NAWADAY: Not from the government.

4 MR. DRATEL: No, your Honor.

5 THE COURT: 45.

6 MR. NAWADAY: Similar change in the section labeled  
7 "carry," the one, two, three, four, five, six, seven, eighth  
8 line should be "commission of the crime of violence" not "drug  
9 trafficking crime."

10 THE COURT: That change will be made as well.

11 MR. NAWADAY: Same change further down the page in the  
12 section labeled "possess." The one, two, three, fourth line,  
13 should be "possession of a firearm in furtherance of a crime of  
14 violence."

15 THE COURT: Anything else on 45, Mr. Dratel?

16 MR. DRATEL: Just the last sentence that carries over  
17 onto 46, which is a preview, a foreshadowing of the aiding and  
18 abetting instruction. I would just ask that the Court just say  
19 that you'll define aiding and abetting later on rather than  
20 give them sort of one sentence that -- I'm just afraid that  
21 it's just -- it's too much of a summary and then the charge  
22 itself is more complex. Around rather than -- just have the  
23 whole charge in one spot. I would just say, "I will shortly  
24 explain to you the concept of aiding and abetting," and just  
25 leave it at that.

E8k9chr3

1 THE COURT: Where do we thereafter define it?

2 MR. DRATEL: Aiding and abetting? It comes up -- 56.

3 MR. NAWADAY: It's on page 56.

4 THE COURT: I think I'm happy to take that last  
5 sentence out.

6 MR. DRATEL: I'm sorry. I didn't hear the court.

7 THE COURT: I'm going to take that sentence out, that  
8 last sentence.

9 MR. DRATEL: Thank you.

10 THE COURT: 47.

11 MR. NAWADAY: Nothing from the government.

12 MR. DRATEL: I think there's a missing -- the close of  
13 quotation in paragraph three after crime of violence. I think  
14 just need to close the quote there.

15 THE COURT: Just take that quote out.

16 MR. DRATEL: Okay.

17 THE COURT: Since we're not quoting anything.  
18 So we'll just take that out.

19 MR. DRATEL: Also, your Honor, on that last paragraph  
20 where it says "I instruct you that the robbery conspiracy  
21 alleged in Count One of the indictment," and then would add the  
22 following clause, "If you find beyond a reasonable doubt that  
23 the defendant you are considering is guilty of participating in  
24 that conspiracy," and then continue.

25 THE COURT: So you would propose to include the

E8k9chr3

1 following clause, and I'll read the entire sentence as  
2 proposed, "I instruct you that the robbery conspiracy alleged  
3 in Count One of the indictment, if you find beyond a reasonable  
4 doubt that the defendant you are considering participated in  
5 that conspiracy, qualifies under the law as a crime of violence  
6 for which Raymond Christian and Glenn Thomas may be prosecuted  
7 in a Court of the United States."

8 MR. DRATEL: Yes, sir.

9 MR. NAWADAY: No objection.

10 THE COURT: Very well. That change will be made.

11 48.

12 MR. DRATEL: Nothing, your Honor.

13 THE COURT: 49.

14 MR. DRATEL: 49 we have, after 49 we have proposed an  
15 instruction with respect to felony murder. Actually two  
16 things. One is that I think that -- the felony murder  
17 instruction that we propose is that, "If you have a reasonable  
18 doubt as to whether Jeffrey Henry was killed by two bullets  
19 from the gun fired by Akinto Boone or two bullets fired from a  
20 gun -- fired by one of the robbers, as a matter of law you must  
21 vote to acquit on Count Four" based on the authority that we  
22 propose to the Court from the majority of U.S. jurisdictions  
23 with respect to the agency approach with respect to felony  
24 murder.

25 THE COURT: Mr. Nawaday.

E8k9chr3

1 MR. NAWADAY: Your Honor, we don't think this  
2 instruction is appropriate at all. And we think the  
3 instruction your Honor has is the standard instruction that's  
4 given in this court and just object to this instruction.

5 THE COURT: I do note for the record that as the  
6 defendants correctly note, there is no Second Circuit opinion  
7 which supports the instruction that they request. Counsel cite  
8 to numerous state jurisdictions and perhaps even a First  
9 Circuit jurisdiction, if I'm remembering correctly.

10 MR. BUCHWALD: I think the First Circuit goes against  
11 us.

12 THE COURT: Okay. So I am going to keep the  
13 instruction that I have in my proposed charge and will not  
14 follow the authority that's been cited by the defendants.

15 MR. DRATEL: Thank you, your Honor.

16 THE COURT: Any other comments on page 49?

17 MR. DRATEL: No, your Honor.

18 MR. NAWADAY: No, your Honor. The government's next  
19 comment isn't until page 64.

20 THE COURT: Page 50.

21 MR. DRATEL: Nothing. I think our next comment is  
22 page 57. So the government said 54?

23 MR. NAWADAY: No. Our next one is 64.

24 THE COURT: So let's go to page 57.

25 MS. STAFFORD: I'm sorry, your Honor, page 50.

E8k9chr3

1 I was wondering what you had planned to put in there  
2 because Mr. Whitaker is no longer charged with Count Six.

3 THE COURT: We don't intend to have him convicted of  
4 Count Six.

5 MS. STAFFORD: That's very good.

6 MR. NAWADAY: Your Honor, while we're on page 50. Is  
7 it your Honor's practice to send back the indictment? If so,  
8 we can prepare redacted --

9 THE COURT: Yes. You should prepare a redacted  
10 indictment. It is my practice, assuming that it doesn't  
11 involve any undue burden on the parties or the court to prepare  
12 an indictment for the jury to have.

13 MR. NAWADAY: We'll do that.

14 THE COURT: During its deliberations.

15 MR. BAUER: Just to be clear -- because I can have  
16 somebody start working on it -- do we want the actual one  
17 redacted or can we just redo one and it will be unsigned? I  
18 think the latter is the wiser way to go.

19 THE COURT: I'm happy to have one that's a new one.

20 MR. BAUER: Because it will erase Mr. Whitaker from  
21 Count Six. It will erase James Williams, who is also on the  
22 indictment. I guess we could also redact the two --

23 THE COURT: I'm happy to have a clean one. Does the  
24 defense have any objection to that?

25 MR. DRATEL: Clean.

E8k9chr3

1 MR. BAUER: We will prepare a clean one. Thank you,  
2 your Honor.

3 MR. BUCHWALD: Make the changes on the quantity issue?

4 MR. NAWADAY: Yes.

5 THE COURT: So we will omit Mr. Whitaker from Count  
6 Six.

7 Now to page 57, correct?

8 MR. DRATEL: Yes. The last paragraph. I would just  
9 ask for -- I would just add "the government proves beyond a  
10 reasonable doubt that."

11 THE COURT: I'm sorry. Where are we?

12 MR. DRATEL: Page 57, last paragraph it says, "If the  
13 defendant you are considering did all three of these things," I  
14 would just add after "if" so it should read, "If the government  
15 proves beyond a reasonable doubt that the defendant."

16 MR. NAWADAY: No objection.

17 THE COURT: So, "If the government proves beyond a  
18 reasonable doubt that the defendant you are considering," okay.

19 58.

20 MR. DRATEL: I think with respect to 58, your Honor,  
21 the third sentence, the one that starts "While you are to  
22 carefully consider the evidence adduced by the government," I  
23 would delete everything on the rest of that line, the next  
24 line, and then the rest of that sentence. And just have it  
25 read "While you are carefully -- you are to carefully consider

E8k9chr3

1 the evidence adduced by the government," then just continue  
2 "your concern is to determine whether on the evidence or lack  
3 of evidence each defendant's guilt has been proven beyond a  
4 reasonable doubt." I think the question of speculating why  
5 techniques were used or not is a fair -- is a fair exercise for  
6 the jury not so much in terms of why the government did one  
7 thing or another but whether the government, in terms of the  
8 completeness or -- what the investigation produced based on the  
9 techniques used as a concept of lack of evidence. This would  
10 suggest that the jury can't -- that couldn't take into account  
11 whether certain forensic investigative techniques, which either  
12 weren't used or were used and yielded results or didn't yield  
13 results, that that wouldn't be relevant. And I think it is  
14 relevant. It's not a question of whether or not the government  
15 is obligated but I think it's a question of just for the jury  
16 to determine whether there's sufficient evidence or there's a  
17 lack of evidence, that this goes too far with that statement in  
18 it.

19 I agree with the concept, as I've said, with the  
20 initial statement. And as I've amended it, we have no problem  
21 with it, just that it just goes too far with all that in it.

22 THE COURT: Mr. Nawaday.

23 MR. NAWADAY: Just to make sure, Mr. Dratel. Are you  
24 suggesting deleting the clauses "the government is not on  
25 trial; law enforcement techniques are not your concern"?



E8k9chr3

1 MR. DRATEL: Starting with, "You are not to speculate  
2 to why they used the techniques they did or why they did not  
3 use other techniques." Just so that sentence would read,  
4 "While you are to carefully consider the evidence adduced by  
5 the government, your concern is to determine whether on the  
6 evidence or lack of evidence each defendant's guilt has been  
7 proven beyond a reasonable doubt."

8 Again, it states "There is no legal requirement that  
9 the government prove its case through any particular means."

10 MR. NAWADAY: Your Honor, there's been, through  
11 cross-examination it's clear that part of the defense is that  
12 certain techniques were not used. So I think it is appropriate  
13 that there is an instruction that the jurors aren't supposed to  
14 speculate about whether certain techniques were used or not. I  
15 don't have a problem with striking the sentences: "The  
16 government is not on trial. Law enforcement techniques are not  
17 your concern" since that is somewhat redundant of our point  
18 which is, "You are not to speculate as to why they used the  
19 techniques they did or why they did not use other techniques"  
20 as long as that clause is still in there, I'm fine striking the  
21 two sentences that follow.

22 THE COURT: I agree with that. So I'll do that. I'll  
23 remove only the following two sentences, "The government is not  
24 on trial. Law enforcement techniques are not your concern."  
25 Otherwise, I think the instruction is appropriate because of

E8k9chr3

1 the cross-examination that was conducted particularly with --  
2 particularly with respect to DNA, but also with respect to why  
3 certain phonecalls were not made, why certain phonecalls with  
4 the use of cooperating witnesses. So I think it is  
5 appropriate.

6 MR. BUCHWALD: Your Honor, would you consider saying  
7 "While you may consider law enforcement's failure to utilize  
8 certain techniques, you may not speculate as to why it did or  
9 did not use them"?

10 THE COURT: No.

11 MR. BUCHWALD: Because they certainly can consider it  
12 in their deliberations.

13 THE COURT: No. I will not make that change.

14 Anything else on page 58?

15 MR. DRATEL: No, your Honor.

16 THE COURT: 59 -- is there a need for 59? Uncalled  
17 witnesses?

18 MR. BUCHWALD: We don't know yet. I think you can  
19 wait to see after summation.

20 THE COURT: How could we possibly not know yet?

21 MR. DRATEL: I just don't know whether people are  
22 going to sum up on it or not.

23 THE COURT: Okay. So let's leave it in.

24 Page 60.

25 MR. DRATEL: Yes, your Honor, that last paragraph that

E8k9chr3

1 begins, "In evaluating the testimony of cooperating immunized  
2 witnesses." We think it should read as follows, "You should  
3 ask yourselves whether the witness" and then add the following  
4 and replace some of the language but add the following. So,  
5 it's "whether the witness," and then "perceives himself or  
6 herself to benefit" and then go back to "more by lying or  
7 telling the truth." And then the next sentence, "Was his or  
8 her testimony made up in any way because he or she believed or  
9 hoped that he or she would somehow receive favorable  
10 treatment."

11 I'm sorry. Let me start again with that sentence.  
12 "Was his or her testimony made up in any way because he or she  
13 believed or hoped that he or she would somehow receive  
14 favorable treatment," and then by testifying, and then we would  
15 add "In a way he or she perceives to be helpful to the  
16 government."

17 THE COURT: Mr. Nawaday.

18 MR. NAWADAY: Your Honor, one, I think what your Honor  
19 has in this charge is -- covers what I think Mr. Dratel is  
20 going for. I don't think adding the words "perceives or doing  
21 that wordsmithing really changes or adds anything; if anything,  
22 it confuses things.

23 And also I object to interposing, you know, "trying to  
24 please the government" into this instruction. I think it's, as  
25 written, it talks about the witness's own motivations for their

E8k9chr3

1 own benefit and for those reasons I don't think Mr. Dratel's  
2 suggestions are appropriate.

3 THE COURT: I'm sorry. Did you want to say something?

4 MR. DRATEL: No. Just we think that there's a  
5 prospect for -- for the jury misapprehending what is in the  
6 mind of the cooperating witness in terms of incentives and  
7 motivations and what they think will help themselves.

8 THE COURT: I don't think there's any chance of that.  
9 I think they know very well what cooperating witnesses hope to  
10 obtain and what their various motivations can be. I'm not  
11 going to make that change. I think the way it is states  
12 clearly what the witness -- what the jury may consider.

13 Anything else on page 60?

14 MR. DRATEL: No, your Honor.

15 THE COURT: 61.

16 MR. DRATEL: The only thing on 61 is that in the  
17 second full paragraph when you have "Even if you find that a  
18 witness testified falsely in one part you may still accept his  
19 or her testimony in other parts or you may disregard all of  
20 it."

21 We think that the Court's expression of that on page  
22 79 is better and ought to be put here and then repeated on 79.  
23 But we think it's just -- it's just a better expression of that  
24 principle, the way the Court has it on 79, carries over from  
25 78, but it begins with the first sentence on 79, "If you find

E8k9chr3

1 that any witness has willfully testified falsely as to any  
2 material fact." We just think that's a better expression.

3 THE COURT: So put that paragraph --

4 MR. DRATEL: Yes. Instead of -- after "all or nothing  
5 fashion." So it would take out that last two sentences of the  
6 paragraph on 61 and substitute what's on page 79.

7 THE COURT: I'm happy to do that.

8 MR. DRATEL: Thank you, your Honor.

9 THE COURT: I agree that it's better stated on 78 and  
10 79.

11 Anything more on 61?

12 MR. DRATEL: No, your Honor.

13 THE COURT: 62.

14 MR. DRATEL: 62, the instruction as given -- as  
15 presented is fine. We just think there's a potential for  
16 confusion on the part of the jury that there's some other  
17 evidence or something that informants have contributed that the  
18 jury perhaps has not heard and we think that there has to be  
19 some way to eliminate that prospect, the danger that the jury  
20 might do that. So we would just propose a sentence at the end.  
21 "You have heard the entirety of the evidence furnished by  
22 informants or other witnesses in this case."

23 MR. NAWADAY: Your Honor, I don't know if that's a  
24 proper jury instruction.

25 THE COURT: Let me just -- it may not be right as a

E8k9chr3

1 factual matter but I just want to see if I can discern what the  
2 concern is.

3 I really don't see what the concern is, Mr. Dratel. I  
4 don't know that it's appropriate to give that instruction. So  
5 I'm going to deny that request.

6 MR. DRATEL: Your Honor, there is also --  
7 Mr. Greenfield has handed me a Sand charge on informants for  
8 the purpose of cautionary instruction similar to cooperating  
9 witnesses that -- that has to be examined with greater scrutiny  
10 than the testimony of an ordinary witness. So if the Court  
11 could include or either refer back to the admonition with  
12 respect to cooperating witnesses and then apply it to  
13 informants as well, we think that would be appropriate.

14 THE COURT: Except that we talk about the -- the  
15 previous section deals with cooperating witnesses. So I'm not  
16 going to pile on here.

17 Anything else on page 62?

18 MR. DRATEL: No, your Honor.

19 THE COURT: 63?

20 MR. DRATEL: No.

21 THE COURT: Do we need to include -- there's a  
22 highlighted section there. Do we need to include specific  
23 places?

24 MR. NAWADAY: I don't think we do, your Honor.

25 THE COURT: Okay. So we'll take out the clause

E8k9chr3

1 "including the search of."

2 Were there searches -- there were searches at the time  
3 of the arrest, correct? There was at least one gun that was  
4 taken from Mr. Thomas when he was arrested.

5 MR. NAWADAY: Yes. There was testimony of searches  
6 conducted by law enforcement.

7 THE COURT: Very well. Mr. Greenfield.

8 MR. GREENFIELD: Can we take a few minutes?

9 THE COURT: Yes. Let's take ten minutes. Ten  
10 minutes.

11 (Recess)

12 THE COURT: Let's move forward. I just noted with  
13 some alarm that I might not have an opportunity to eat.

14 Page 63.

15 MR. BUCHWALD: Page 63. We would ask that the second  
16 full paragraph, "Evidence obtained from these searches was  
17 properly admitted in this case and may be properly considered  
18 by you." We would take out the second "properly." It was  
19 properly admitted; it may be considered by you. Otherwise it's  
20 suggestive that maybe this should be given greater  
21 consideration.

22 THE COURT: Well I don't know about that but I will  
23 take out the second "properly."

24 Anything else on 63?

25 MR. DRATEL: No, your Honor.

E8k9chr3

1 THE COURT: 64?

2 MR. DRATEL: 64. I think that it needs a sentence  
3 about what weight you ascribe to this evidence for the jury to  
4 determine.

5 MR. NAWADAY: I'm sorry. I missed that.

6 MR. DRATEL: There's -- it doesn't have a -- the  
7 instruction needs something about that the jury can ascribe to  
8 it whatever weight it wants. We have some language, actually.

9 MR. NAWADAY: What page are we on?

10 MR. DRATEL: 64.

11 I also think 64 and 65 may be combined but I don't  
12 know if that's more efficient or less efficient at this point  
13 in the sense that the court mentions on 64 that the tapes --  
14 that the transcripts are not evidence.

15 I'm sorry. The transcript as an aid. And whether you  
16 just want to put the rest of 65 in there. But we would just,  
17 for the weight part, the second paragraph, "You must therefore,  
18 regardless of the personal opinions," and then we have agreed  
19 "consider such evidence, make your determination both as to its  
20 meaning and significance, if any, to the charge and the  
21 defendant you are considering" and then just continue, "along  
22 with all of the other evidence in the case in determining  
23 whether the government has proven."

24 MR. NAWADAY: So you're just adding "if any"?

25 MR. DRATEL: I'm sorry?



E8k9chr3

1 MR. NAWADAY: You're just adding "if any"?

2 MR. DRATEL: We're adding the whole clause, because  
3 we're taking out everything after "personal opinions," and  
4 taking out that whole clause, "give this evidence full  
5 consideration."

6 THE COURT: Oh, you are, are you?

7 MR. DRATEL: I'm sorry?

8 THE COURT: You are, are you? You said that you're  
9 taking it all out?

10 MR. DRATEL: Yes. Taking that out until you get to  
11 "along with."

12 So, "give this evidence full consideration," is what  
13 we'd take out and substitute, instead, "Consider such evidence,  
14 make your determination both as to its meaning and  
15 significance, if any, to the charge and the defendant you are  
16 considering," and then continue with "along with all of the  
17 other evidence in the case."

18 THE COURT: I don't want to take out the charge and  
19 the defendant you are considering because that just makes it  
20 unwieldy.

21 MR. NAWADAY: What Mr. Dratel suggests is fine with  
22 your Honor's caveat.

23 THE LAW CLERK: "Consider such evidence, make your  
24 determination as to its meaning and significance, if any"?

25 MR. DRATEL: Yes.

E8k9chr3

1 THE LAW CLERK: Correct?

2 MR. DRATEL: Yes.

3 THE LAW CLERK: Thank you.

4 MR. NAWADAY: Your Honor, we had comments to the first  
5 paragraph.

6 THE COURT: Okay.

7 MR. NAWADAY: Because it's just one video recording.

8 THE COURT: Okay.

9 MR. NAWADAY: So just to harmonize it, we suggest  
10 paragraph one read --

11 THE COURT: Well actually there's more than one video  
12 recording.

13 MR. NAWADAY: Oh, that's right. There is the pole  
14 camera. So really the -- our comment would just be to the  
15 third sentence, "Whether you approve or disapprove of the  
16 recording" and then delete "or interception of."

17 THE COURT: Okay.

18 MR. NAWADAY: So it would read "disapprove of the  
19 recording may not enter into your deliberations."

20 That's all.

21 THE COURT: So we're just taking out what?

22 MR. DRATEL: "Or interception of."

23 MR. NAWADAY: "Or interception of those  
24 conversations."

25 THE COURT: So we're taking out "those conversations"

E8k9chr3

1 also?

2 MR. NAWADAY: Yes, your Honor.

3 MR. DRATEL: No. We need that for the recording.

4 MR. NAWADAY: Right.

5 MR. DRATEL: Just before -- "or interception" I think.

6 MR. NAWADAY: Right. Just "or interception" because  
7 there is no --

8 MR. DRATEL: Interception.

9 It's just "or interception" that needs to be taken  
10 out.

11 THE COURT: So "whether you approve or disapprove of  
12 the recording of those conversations."

13 MR. NAWADAY: Yes.

14 THE COURT: Okay.

15 65.

16 MR. DRATEL: We would add -- I'm trying to see  
17 where -- just one second, your Honor.

18 We're okay, your Honor. There's nothing.

19 THE COURT: 66.

20 MR. DRATEL: I think there are some redactions.

21 THE COURT: 67.

22 MR. NAWADAY: I think 67 is inapplicable. All the  
23 charging tables that were -- except for the transcripts of the  
24 Burden recording, everything else, we did that in evidence.

25 MR. DRATEL: There are no summary charts or anything

E8k9chr3

1 like that.

2 THE COURT: No. So that comes out.

3 MR. DRATEL: Yes.

4 THE COURT: 68 comes out.

5 MR. DRATEL: Right.

6 THE COURT: 69.

7 MR. DRATEL: I couple things on 69, your Honor. One  
8 is that -- I don't think the questions of mistake, accident,  
9 other reasons really applies. I think the government has to --  
10 404(b) has to be articulated for a specific reason not for sort  
11 of all the reasons in 404(b). And with respect to the next  
12 paragraph, the one that begins "initially," to us that is  
13 really just a definition -- is really a propensity in the sense  
14 that it's sort of if you find that the defendant engaged in  
15 earlier acts, similar characteristics that are charged in the  
16 indictment. That sounds like propensity. The government  
17 hasn't made a modus operandi argument or anything like that.

18 THE COURT: So we do need this charge?

19 MR. DRATEL: I think we need for the court to -- what  
20 I thought the court would do would be to -- certainly the first  
21 paragraph and also maybe repetition of the essence of the  
22 limiting instructions that the court had been giving during the  
23 trial, which is not only with respect to --

24 THE COURT: Except I've already given that.

25 MR. GREENFIELD: Not as to prior acts, Judge. I agree

E8k9chr3

1 with what Mr. Dratel said, at least the first paragraph and  
2 maybe the last.

3 MR. DRATEL: The last sentence, yes. The last  
4 paragraph.

5 THE COURT: I'm sorry. For this charge.

6 MR. GREENFIELD: I'm sorry, Judge. Paragraph one,  
7 paragraph five. Paragraph four. Excuse me.

8 THE COURT: Mr. Nawaday.

9 MR. NAWADAY: I think there needs to be something in  
10 there about what they are allowed to consider it for. And I  
11 think we have shown that the reason we offered those other acts  
12 was to show the relationship and that -- there was no mistake  
13 or accident with these people knowing each other. But I don't  
14 have disagreement with cutting further down -- cutting parts of  
15 paragraphs two and three if defense counsel have a  
16 suggestion -- it sounds like they want to cut the entirety of  
17 those two paragraphs.

18 MR. GREENFIELD: Paragraph three is pure propensity.

19 (Continued on next page)  
20  
21  
22  
23  
24  
25

E8kzchr4

Charge conference

1 THE COURT: By the way there is a blank on line one.  
2 Does this relate to only one defendant or multiple defendants?

3 MR. DRATEL: I think the --

4 THE COURT: To each of them?

5 MR. DRATEL: Well, the government, I mean in the sense  
6 of how it views -- I mean we view it as all.

7 MR. NAWADAY: I think it's safer to say there was  
8 evidence pertaining to each of the defendants, so it should be  
9 defendants.

10 THE COURT: Okay. So the defendants.

11 I'm keeping the second paragraph, by the way. I think  
12 it's appropriate and I think it's a correct statement of the  
13 law.

14 MR. BUCHWALD: Are you keeping it or deleting?

15 THE COURT: Yes, keeping the second paragraph. I'm  
16 happy to consider changes to paragraph three.

17 MR. GREENFIELD: I request that it be deleted, yes.

18 MR. BUCHWALD: Number two, I think all of the  
19 defendants have said that there is no issue of mistake or  
20 accident or anything. I mean it's paragraph two just says, if  
21 you find that they robbed 54 Commerce and that they did other  
22 things as well, you can consider those other things as to  
23 whether they robbed Commerce, 54 Commerce knowingly,  
24 intentionally or by some mistake. Nobody's claiming that they  
25 were there and did it unknowingly or by mistake.

E8kzchr4

Charge conference

1 THE COURT: Well, then we could end the sentence at  
2 the fourth line when we say, "the defendants acted knowingly  
3 and intentionally, period."

4 MR. NAWADAY: Okay.

5 THE COURT: Do that?

6 MR. BUCHWALD: But still the fact that they did  
7 something earlier, to the extent that it's suggesting they did  
8 it knowingly and intentionally, that's just the way of talking  
9 propensity, when there is no defense here that they, that if  
10 they did it, it wasn't knowing or intentionally. There is no  
11 defense here that somehow we did this, but there is another  
12 explanation for it other than guilt or mens rea. That isn't  
13 the defense of any of the defendants here.

14 MR. NAWADAY: Your Honor, as your Honor's aware with  
15 404(b) it sets forth a non-exhaustive list of how 404(b)  
16 evidence comes in. It can come in to show motive, knowledge  
17 and intent. It's not an exhaustive list, so long as it's not  
18 coming in for propensity, for bad character. And so I think  
19 your Honor's suggestion satisfies what the defendants' concerns  
20 are and is what the law requires.

21 THE COURT: The evidence was admitted. I think that  
22 the jury's --

23 MR. BUCHWALD: The evidence was admitted as I  
24 understood in some cases to show relationship between people.  
25 Okay. To the extent it did that, it did that.

E8kzchr4

Charge conference

1 MR. NAWADAY: That evidence did come in, and our view  
2 has always been that it was direct evidence of background  
3 concern as well.

4 MR. BUCHWALD: Well, that's background. If you want  
5 to say offered as evidence of background, okay, background.  
6 But it's not to show that people acted knowingly and  
7 intentionally, when there is no claim that they did it but  
8 somehow with mens rea.

9 MR. NAWADAY: Your Honor, I don't know if this moves  
10 the ball forward or not, but this is a limiting instruction  
11 that is given on the request of the defendants. I don't know  
12 if the defense was saying they don't even want this  
13 instruction?

14 THE COURT: That's my, that was my initial question,  
15 do you even want this instruction?

16 MR. BUCHWALD: Well --

17 MR. GREENFIELD: Yes, Judge, I do.

18 MR. BUCHWALD: Having come in in some cases, we don't  
19 think properly, but that was made, having come in I think it's  
20 important that they be told it was for a very narrow purpose --  
21 not to show guilt, not to show mens rea, not to show modus  
22 operandi, not to --

23 THE COURT: Okay, so I'll take out the paragraphs two  
24 and three.

25 MR. BUCHWALD: With respect to paragraph one, your



E8kzchr4

Charge conference

1 Honor, you've heard evidence that on earlier occasion -- and I  
2 think defendants engaged in conduct similar in nature -- I  
3 think you should say, similar in nature to certain of the  
4 conduct charged in the indictment.

5 THE COURT: No.

6 MR. BUCHWALD: Because there is no evidence, for  
7 example, that when Thomas engaged in robberies of drug dealers.

8 THE COURT: I'm going to leave it as it is.

9 MR. GREENFIELD: I'm sorry, Judge?

10 THE COURT: I said I'm going to leave it as it is,  
11 that first paragraph and the last paragraph, except the first  
12 paragraph the first line will read, you have heard evidence  
13 that on an earlier occasion the defendants engaged in conduct.

14 MR. GREENFIELD: Thank you, sir.

15 THE COURT: Okay. Page 70?

16 MR. DRATEL: Nothing, your Honor.

17 THE COURT: 71 we don't need, correct?

18 MR. DRATEL: No.

19 MR. NAWADAY: I believe that's correct.

20 MR. DRATEL: Correct.

21 THE COURT: 72, venue.

22 MR. DRATEL: Your Honor, we propose eliminating the  
23 venue, just because I think it's confusing with respect to the  
24 standard of proof. I don't think there is any question of  
25 venue here. So we don't have an objection with respect to

E8kzchr4

Charge conference

1 venue.

2 I've been in cases where the Court has just said, if  
3 it occurred in the Southern District of New York, there's  
4 venue. We wouldn't have an objection to that.

5 In a case like this, we waive that argument because,  
6 you know, this is not case where venue is, in any way, in  
7 dispute, and I would rather not have the prospect of separate  
8 standard of proof that the jury could somehow get confused, and  
9 leave it the way, you know, leave it with one consistent burden  
10 of proof.

11 MR. NAWADAY: Your Honor, I think venue's waiveable.  
12 If all defense counsel on behalf of their clients will now say  
13 that they are waiving any issue with venue or they're admitting  
14 to venue on the record, I think it should be fine that the jury  
15 doesn't return a venue finding. I just need to confirm it with  
16 my superiors. But to the extent it's possible, I don't  
17 think --

18 THE COURT: Or we could also just tell the jury it is  
19 not disputed that venue is appropriately in the Southern  
20 District of New York.

21 MR. NAWADAY: Venue having shown.

22 MR. DRATEL: Okay.

23 MR. GREENFIELD: That's fine.

24 MR. DRATEL: Yes, your Honor.

25 MR. NAWADAY: I just need to make sure that, not

E8kzchr4

Charge conference

1 having done this before, that that will work, that we have a --  
2 whatever verdict comes out, should it come out as conviction,  
3 that the fact that a jury didn't find venue is okay, and that  
4 we've papered in or said it orally.

5 THE COURT: Okay. But what I would propose to do is  
6 to read the first sentence: "Which, in addition to all of the  
7 elements that I have described for you for each of the six  
8 counts, you must also find whether the crimes charged in the  
9 indictment took place at least in part within the Southern  
10 District of New York, which includes Newberg, New York, and in  
11 this regard you are instructed that there is no dispute in this  
12 case that venue is appropriate in the Southern District of New  
13 York."

14 MR. NAWADAY: We would still have it on the verdict  
15 form, a check mark for venue?

16 THE COURT: I don't know that I've ever seen venue --

17 MR. DRATEL: No --

18 THE COURT: -- on a verdict form.

19 MR. DRATEL: I don't either.

20 MR. NAWADAY: I think that's actually -- that's right,  
21 your Honor. So I think that should probably work.

22 THE COURT: Okay. Then the rest of the stuff is  
23 absolute pure boiler plate.

24 Mr. Dratel, I have considered your instruction on  
25 circumstantial evidence. I like mine better, so I'm going to

E8kzchr4

Charge conference

1 go with that. Not that yours is also similarly invocative, but  
2 I'll go with mine.

3 Anything on pages 73 through the balance of the  
4 instructions?

5 MR. DRATEL: One thing, your Honor, is, and I think  
6 there's some -- I'm just looking to see whether there is some  
7 that aren't necessary any more, but I think they all are in  
8 here.

9 I think we've gone past necessary or not necessary.  
10 But on page 73, what is and what is not evidence. And last  
11 paragraph says, you are not to consider as evidence questions  
12 asked by the lawyers. It's witnesses answers that are  
13 evidence, not the questions.

14 I think, though, that there is problem with,  
15 particularly with respect to cross-examination where all the  
16 fact questions were answered yes or no. So I would propose  
17 this sentence, which is, if a witness affirms the facts in a  
18 question by answering yes, you may consider the facts in that  
19 question to be evidence.

20 THE COURT: No. I will not do that.

21 MR. GREENFIELD: I have one last, Judge.

22 THE COURT: Yes?

23 MR. GREENFIELD: Page 81, law enforcement witnesses,  
24 line four. After the word witness, I would add, at the same  
25 time it is quite legitimate that defense counsel to try to

E8kzchr4

Charge conference

1 attack the credibility of a law enforcement witness on the  
2 grounds that his testimony may be colored by personal or  
3 professional interest in the outcome of the case. And that's  
4 out of Sand, instruction 7-16.

5 MR. NAWADAY: No objection.

6 THE COURT: Okay. Sand instruction what?

7 MR. GREENFIELD: 7-16.

8 THE COURT: 7-16.

9 MR. GREENFIELD: I will hand up my handwritten notes  
10 to you, if that's okay.

11 THE COURT: You may as well give us something,  
12 Mr. Greenfield.

13 THE DEPUTY CLERK: Thank you.

14 THE COURT: Anything else?

15 MR. DRATEL: Just, your Honor, on impeachment by prior  
16 inconsistent statement.

17 THE COURT: Yeah.

18 MR. DRATEL: Page 82, second sentence, evidence of a  
19 prior inconsistent statement is not to be considered by you as  
20 affirmative evidence bearing on -- it says the guilt of the  
21 defendant. I would just ask to change that to whether or not,  
22 you know, the defendant is guilty or whether the government has  
23 proved the defendant's guilt beyond a reasonable doubt.

24 THE COURT: Bearing on whether the government has  
25 proved the defendant's guilt beyond a reasonable doubt?

E8kzchr4

Charge conference

1 MR. DRATEL: Yes. Yes, your Honor.

2 THE COURT: Okay.

3 MR. DRATEL: And in the second paragraph, in terms of  
4 what the jury should evaluate, in terms of, you may consider  
5 whether a witness, and then there is a couple of examples. I  
6 would also say a number of inconsistencies would also be a  
7 factor?

8 THE COURT: I'm sorry, you are where?

9 MR. DRATEL: In paragraph two says, in making this  
10 determination you may consider whether a witness purposely made  
11 false statement or whether it was an innocent mistake, whether  
12 the inconsistency concerned an important fact or whether it had  
13 to do with small detail. I would just add also whether, I  
14 would just say also the number of inconsistencies in a  
15 defendant's testimony -- I mean, rather, in a witness'  
16 testimony.

17 THE COURT: That application is denied.

18 MR. DRATEL: Thank you, your Honor.

19 I think that may be everything I have.

20 MR. NAWADAY: Your Honor, the Government's next  
21 comment is on page 86, expert testimony.

22 THE COURT: Okay.

23 MR. NAWADAY: And there were two experts, so we'd  
24 suggest adding first sentence.

25 THE COURT: I'm sorry.

E8kzchr4

Charge conference

1 MR. NAWADAY: At the end, you heard expert testimony  
2 from Mr. Meyers, forensic scientist and Dr. Ely, Medical  
3 Examiner.

4 THE COURT: Medical Examiner?

5 MR. NAWADAY: Medical Examiner.

6 THE COURT: Okay.

7 MR. DRATEL: Oh, your Honor just 95, second, third  
8 sentence, if the government has succeeded on a particular  
9 count, I would just say with respect to the defendant you are  
10 considering.

11 THE COURT: Okay.

12 MR. DRATEL: And then on the next page, 96, with your  
13 admonition, do not listen, watch, I would also add the social  
14 media admonition the Court has been using during the trial.

15 THE COURT: I'm sorry, where precisely?

16 MR. DRATEL: 96, the third paragraph, do not listen or  
17 watch or read. And I know the Court has been incorporating a  
18 social media admonition, and I think it's appropriate  
19 because --

20 THE COURT: Very well.

21 MR. DRATEL: To add that.

22 THE COURT: Okay.

23 MR. NAWADAY: Your Honor --

24 MR. BUCHWALD: I think we left hanging where you were  
25 going to put some language about the 2007 drug activity, it's

E8kzchr4

Charge conference

1 not part of this in conspiracy. Did we decide where that was  
2 going?

3 THE COURT: Where are we putting that?

4 MR. NAWADAY: Your Honor, I suggested the prior acts  
5 instruction.

6 MR. BUCHWALD: Okay.

7 MR. NAWADAY: Or right after it.

8 THE COURT: Okay. I guess we can either put it there  
9 or in the conspiracy drug conspiracy charge.

10 MR. NAWADAY: That might be more appropriate. It's  
11 Mr. Buchwald's application so.

12 MR. BUCHWALD: Better in the conspiracy charge.

13 THE COURT: Okay, so we'll put it in drug conspiracy  
14 charge section.

15 I see Ms. Stafford standing up. We have considered  
16 the request made by Mr. Whitaker, and rather than give a  
17 general instruction in that regard, what we propose to do is as  
18 we discuss each count, identify specifically which defendant is  
19 charged in that count. So, you know, count one, the following  
20 defendants are charged in this count, then list the defendants.

21 MS. STAFFORD: The only thing, your Honor, that I  
22 would like to point out is page 11, since we have the unique  
23 situation that Mr. Whitaker is not charged in the conspiracy,  
24 the dates actually do matter with regard to him, meaning that  
25 he's only involved in the robbery and that he's only involved



E8kzchr4

Charge conference

1 in the possession of the gun charge in connection with that --  
2 I'm sorry -- he's also charged in count two. So just to make  
3 the record complete, I would just make the argument that it  
4 would need to be the way that particular instruction stands  
5 right now, I don't know if that's going to sufficiently cover  
6 the fact that the jury is not to consider Mr. Whitaker's, any  
7 other crimes except what happened on that particular date.

8 THE COURT: Well, again, I mean the jury is going to  
9 be directed to consider each count and each defendant  
10 separately, and this instruction I think properly directs them  
11 that they should consider that they, you know, any -- as long  
12 as they the are substantially similar, that they can consider  
13 the dates that were introduced at trial.

14 MS. STAFFORD: However, just because he's not in the  
15 conspiracy on or about does not, you know, pertain to  
16 Mr. Whitaker and, therefore, that would be, we would argue, a  
17 variance of the indictment.

18 THE COURT: Well, no -- again, I don't have the  
19 indictment in front of me, but as I understand any indictment  
20 that I've ever seen, each count has on or about a particular  
21 date or on or about a particular range, and I assume that with  
22 respect to Mr. Whitaker the counts in which he remains include  
23 similar language. Am I wrong about that, Mr. Nawaday?

24 MR. NAWADAY: That is correct, your Honor. And I  
25 think the fact that your Honor's giving an instruction that

E8kzchr4

Charge conference

1 they can only consider each defendant as to each count he's  
2 charged in, it's going to be clear to the jurors that he's not  
3 charged in the robbery conspiracy, so they won't consider it on  
4 that count.

5 THE COURT: Right, okay.

6 Now, we do have the jury coming back in a couple of  
7 minutes. Did the parties wish me to make any record  
8 concerning, well --

9 MR. NAWADAY: I still --

10 THE COURT: Let's to go Mr. Nawaday first.

11 MR. NAWADAY: I still have one more comment on the  
12 charge. I'm sorry, your Honor. I think it's not  
13 controversial. Page 92, your Honor states that the exhibits  
14 will be sent to you in the jury room. I just want to confirm  
15 that the exhibits the jurors will have back there are only the  
16 documents, not the physical evidence which includes guns,  
17 drugs. So your Honor can --

18 THE COURT: Gloves.

19 MR. NAWADAY: If they want to see the physical  
20 evidence or the video recording or any other video recordings,  
21 they can always ask and we can do it out in court.

22 THE COURT: We will make that notation.

23 MR. BUCHWALD: I guess I didn't -- all of the other  
24 evidence is going to go in right at the beginning as opposed  
25 they can have --

E8kzchr4

Charge conference

1 THE COURT: We're not sending in the guns or the  
2 bullets or the bloodied clothes or anything like that.

3 MR. BUCHWALD: But everything else will.

4 THE COURT: Yes, all the documents will go in. The  
5 pictures.

6 MR. GREENFIELD: Shell casings?

7 THE COURT: No.

8 MR. GREENFIELD: I'm teasing you.

9 THE COURT: No. Anything further, Mr. Nawaday?

10 MR. NAWADAY: Not from the government.

11 THE COURT: Anything further from the defense on the  
12 jury instructions?

13 MR. DRATEL: No, your Honor.

14 THE COURT: Very well. What did the parties wish me  
15 to do with respect to the allocution as to the defendants'  
16 right to testify?

17 MR. DRATEL: We'd like to do it ex parte, your Honor,  
18 if we could.

19 THE COURT: Okay. Mr. Nawaday, would you mind  
20 terribly? And please make sure that no one comes in.

21 MR. NAWADAY: Maybe I can go get some lunch, your  
22 Honor. I'll stand guard.

23 THE COURT: You can get lunch when Bauer starts to  
24 talk.

25 (The following pages 2149 TO 2151 are filed under

E8kzchr4

Charge conference

seal)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

E8kzchr4

Charge conference

1 (In open court; government present)

2 THE COURT: We have ten minutes before the jury's  
3 back. If you guys need to run to the bathroom for any reason,  
4 do so, but please be back by no later than 12:30, okay.

5 Please be ready at 12:30.

6 (Recess)

7 THE COURT: Okay, let's get the jury.

8 THE DEPUTY CLERK: All rise.

9 (Jury present)

10 THE COURT: Everyone please be seated.

11 Mr. Greenfield, on behalf of Mr. Christian, do you  
12 have any further evidence?

13 MR. GREENFIELD: Your Honor, at this time the  
14 defendant Raymond Christian rests.

15 THE COURT: Thank you.

16 Mr. Goltzer, on behalf of Mr. Whitaker?

17 MR. GOLTZER: Your Honor, the defense rests.

18 THE COURT: Thank you.

19 Mr. Buchwald.

20 MR. BUCHWALD: Yes, your Honor. The defendant Thomas  
21 rests.

22 THE COURT: Thank you.

23 Ladies and gentlemen, all the parties have now rested  
24 we will now proceed to closing arguments. Because it is the  
25 Government's burden, they will have the first opening argument,

E8kzchr4

Charge conference

1 and they will also present rebuttal to any defense arguments  
2 that may be made. Mr. Bauer.

3 MR. BAUER: Thank you, your Honor.

4 Your Honor, may I?

5 THE COURT: You may.

6 MR. BAUER: 54 Chambers; seven guys, five guns, masks,  
7 a robbery; victims who are drug dealers; robbers who are drug  
8 dealers; victims who were criminals and were not going to  
9 accept being robbed. A crack spot robbery turns into a botched  
10 robbery when victims and robbers are trapped together in the  
11 same apartment. A recipe for disaster. The robbers were  
12 trapped. They had to get out. They were being shot at and  
13 needed to do whatever it took to get out of that house,  
14 eliminate whatever was in their way. And what was in their  
15 way, ladies and gentlemen, you know, Jeffrey Henry, and they  
16 needed to he eliminate him. That's why we're here, ladies and  
17 gentlemen, pure and simple.

18 These men, Raymond Christian, Tyrell Whitaker, Glen  
19 Thomas entered 54 Chambers Street. They went there thirsty,  
20 thirsty for money, thirsty for drugs. Then they ran into  
21 Jeffrey Henry and their priorities changed. At that point  
22 their thirst was different. Their thirst was for life, to  
23 preserve their lives at the cost of Jeffrey Henry's. When  
24 Jeffrey Henry got in their way, they shot him. They shot him  
25 twice and they killed him.

E8kzchr4

Summation - Mr. Bauer

1           This case, ladies and gentlemen, is about a lot of  
2 things. It's about greed, it's about drug dealing and the  
3 violence that's associated with it. It's about Newburgh and  
4 the gangs that co-exist in the northeast corner of that city.  
5 And this case, ladies and gentlemen, is about Jeffrey Henry,  
6 who tragically lost his life on December 15th, 2010.

7           This case is not, ladies and gentlemen, all about  
8 Anthony Baynes. It's not about Jamar Mallory, Ramone  
9 McDermott. No. They're not a trial. These men are on trial,  
10 Raymond Christian, Tyrell Whitaker, Glen Thomas. They're on  
11 trial. It's their actions, it's their decisions, them,  
12 together with the other four guys, seven guys who went to 54  
13 Chambers looking to rob, and they robbed Jeffrey Henry of his  
14 life.

15           Defense counsel has repeatedly throughout this trial  
16 tried to make this case about Anthony Baynes and the rest of  
17 the cooperators. They're doing that to shift the focus.  
18 They're doing that to skewer what really happened, to distract  
19 from the facts from the overwhelming evidence that proves that  
20 their clients are guilty.

21           Is Anthony Baynes an important witness? Of course he  
22 is. Jamar Mallory? Of course. Baynes is what a lot of murder  
23 cases don't have, an eyewitness to the murder. He's an  
24 accomplice who was involved in planning the robbery, and  
25 involved in the murder. He's clearly an important witness.

E8kzchr4

Summation - Mr. Bauer

1 But is he the only witness? Absolutely not.

2 Defense counsel has tried to make this case about  
3 cooperators. And you know what? We embrace it, we welcome it.  
4 I submit we're going to walk through here today how you will  
5 know that all the cooperators were telling you the truth and  
6 what they said and how it happened is actually how it played  
7 out. And I'm going to ask you to look at a bunch of things  
8 like their demeanor on the witness stand, their incentives,  
9 their incentives to tell the truth versus to lie as they've  
10 done in the past, and they wore it their sleeves.

11 But I'm also going to ask you to look at all the other  
12 evidence. Forget about the cooperators. Look at all the other  
13 evidence that corroborates, which means it matches up with  
14 everything they said that's going to give you the comfort to  
15 know that they were telling you the truth.

16 This case is not complicated, ladies and gentlemen.  
17 You boil it down and it's a group of drug dealing, gun slinging  
18 young men using the streets of Newburgh as their own battle  
19 field. It's about the crack, it's about the guns, it's about  
20 the robberies, and it's about Jeffrey Henry and when his life  
21 was taken.

22 Okay, let's step back. There has been a lot of  
23 evidence here. You've been here for almost three weeks.  
24 You've heard a lot of evidence, but it hasn't come in  
25 chronological order. You have heard piece by piece, witness by



E8kzchr4

Summation - Mr. Bauer

1 witness. You've heard from the cooperators. You've also seen  
2 guns, drugs, bullets, shell casings, bloodstains, masks,  
3 videos, Facebook.

4 I'm now going to turn to put all of those pieces of  
5 evidence together for you. I'm going to try to do it  
6 coherently. But I'll note up front that if I were to tell you  
7 or go through every single piece of evidence we heard here,  
8 we'd be here through the night. It's not my intention. I'm  
9 going to focus on what is important to prove the defendants are  
10 guilty of the crimes charged in the indictment.

11 So I'm going to start by running through the charges  
12 in the indictment, and then I'm going to run through the  
13 evidence. I'm going to run through the evidence based on the  
14 charges, and you'll see piece by piece how the evidence  
15 corroborates or supports the charges.

16 I do want to say one other thing up front. As you  
17 know, the defendants do not have a burden of proof in this  
18 case. That burden is always with the government. What that  
19 means that defense counsel did not have to put on a case,  
20 didn't have to make opening statements, didn't have to do those  
21 stipulations, didn't need to question our witnesses. But they  
22 did. And because of that, we can discuss what they've done.  
23 So throughout this closing argument I'm going to make reference  
24 to arguments that they brought forth during their questions or  
25 during their stipulations. I'm not going to address all of

E8kzchr4

Summation - Mr. Bauer

1     them. I'm going to only address the ones that I think warrant  
2     being addressed, frankly, but that's what I'm going to do. And  
3     it's important to realize that even if I do that, it never  
4     shifts the burden away from this table to that table. So it's  
5     always here. We know it, we embrace it.

6             So let's talk about the indictment. As you recall,  
7     the indictment brought, came in six counts. Count one was the  
8     robbery conspiracy, and count two was the actual robbery of the  
9     narcotics dealers at 54 Chambers Street.

10            Conspiracy, you're going to hear from Judge Ramos, is  
11     simply an agreement between two or more people, in this case  
12     for count one to commit the robbery; count two is the actual  
13     robbery of the narcotics dealers at 54 Chambers Street.

14            The way I see the indictment, it breaks out into  
15     basically two parts. Count one and two that are along with  
16     counts four and five that all relate to the robbery and the  
17     murder of December 15th.

18            The second part is counts three and six, and those  
19     relate to the defendants' drug dealing and the defendants'  
20     usage of guns in furtherance of that.

21            I also want to point out here up front that Thomas and  
22     Christian are charged in all six counts, but Tyrell Whitaker is  
23     only charged in counts two, four and five. Those are the only  
24     ones you're going to be asked to deliberate on as relates to  
25     Mr. Whitaker.

E8kzchr4

Summation - Mr. Bauer

1           So as I said, counts one and two relate to the  
2 robbery. In my mind I skipped count three for the moment and  
3 focus on counts four and five. Count four essentially says  
4 that during that robbery, the defendants used and discharged  
5 firearms that caused the death of Jeffrey Henry -- that's the  
6 murder count -- and count five is related count; it's that they  
7 discharged the firearm in the robbery.

8           So counts one, two, four and five are all related.  
9 Count three is that Thomas and Christian and others conspired  
10 to sell drugs, namely, crack cocaine on the streets of  
11 Newburgh. Then count six is part of that, being a drug dealer  
12 during and in relation to those drug deals they possessed  
13 firearms.

14           So I'm going to first talk about what I've called the  
15 first part, the robbery and murder, counts one, two, four and  
16 five. So what I'd like to do is I'd like to go through the  
17 story of the robbery from beginning to end, piece by piece,  
18 fact by fact. And for each piece we'll discuss all the  
19 evidence, not just what Baynes or Mallory told you, but all the  
20 evidence that shows that the robbery and murder happened as you  
21 heard it did.

22           Let me say two quick things before we jump into the  
23 murder. First about the charges. These defendants are charged  
24 with committing a Hobbs Act robbery, which really just means as  
25 Judge Ramos will tell you, a robbery that affected interstate

E8kzchr4

Summation - Mr. Bauer

1 commerce. And they're charged with that during the course of  
2 that robbery to discharge a firearm causing the death of  
3 Jeffrey Henry. I don't anticipate there is much question as to  
4 whether the technical elements, the legal elements of those  
5 laws are actually met. I think what's in dispute here and  
6 that's what I'm going to address, is who committed those  
7 robberies, who discharged the firearm, and the question is  
8 whether it's these three men.

9 So I'm not going to focus on the elements of these  
10 charges because I'm not -- I'm not really sure that they're in  
11 dispute. But what I do want to say before we start is I want  
12 you to keep a few questions in mind, questions that I'm going  
13 to return to after we talk about the murder, questions about  
14 the witnesses. Is it just -- ask yourself, is it just a  
15 coincidence that all the evidence matches up; that all the  
16 facts, big or little lineup with one another? It's just a  
17 fluke? Are those defendants the unluckiest people in the  
18 world? Is that really what's going on here? Or maybe could it  
19 be a big conspiracy that all these cooperators got together in  
20 different jails, found the other witnesses who are not in jail,  
21 they got their hands on the 911 call and the pole camera and  
22 everything else, and made sure their stories lined up, is that  
23 really what happened, ladies and gentlemen? Of course it  
24 didn't.

25 You heard a lot of evidence during this trial. It

E8kzchr4

Summation - Mr. Bauer

1 wasn't just about Baynes, it wasn't just about Mallory. It was  
2 a mountain, piece of evidence after piece of evidence, brick  
3 after brick. It's a wall of evidence, ladies and gentlemen,  
4 built up around these defendants, and no amount of argument, no  
5 amount of calling the government witnesses liars is going to  
6 help these defendants escape that, not when evidence is so  
7 plentiful, and not when it matches up brick by brick, mortar by  
8 mortar, they are all connected, ladies and gentlemen.

9 Let's start with what's not in dispute about the  
10 facts, ladies and gentlemen. Where did the robbery take place?  
11 54 Chambers. When? December 15th, 2010. Why? To get crack,  
12 to get money. None of that is in serious dispute. What  
13 happened? An armed robbery. When? Just after midnight. And  
14 who? In this case when I ask who, who got killed, Jeffrey  
15 Henry. None of that is in serious dispute, ladies and  
16 gentlemen. What is in dispute is how it all went down. So  
17 let's jump in.

18 And what I've done is I've broken up the murder and  
19 the robbery into steps along the way.

20 Step one, what you heard from Anthony Baynes,  
21 Christian, Raymond Christian, Reckless and Baynes along with  
22 others, walked around Newburgh looking for a spot to rob.

23 Now, ladies and gentlemen, you don't have to rely on  
24 Anthony Baynes for this. Let's start with what he said, but  
25 let's move on after that.

E8kzchr4

Summation - Mr. Bauer

1           What did Baynes tell you? He said, but he and  
2 Reckless were talking about the robbery for a couple of weeks  
3 before December 15th, 2010. And on that day, December 15th, he  
4 told you that they walked around Newburgh looking at a bunch of  
5 crack spots, one on City Center Terrace, one on Johnson, one on  
6 South Street. That is until they chose 54 Chambers. And  
7 Baynes told you what they were doing looking for these crack  
8 spots. Looking for drugs, looking for money because they  
9 wanted to build their drug business on Dubois Street. You  
10 heard it from Baynes, and it makes sense, ladies and gentlemen,  
11 based on the other evidence. You heard they're walking around  
12 with Lou, some guy named Lou from the beginning on  
13 December 14th, and then at some point they drop Lou off and  
14 then, Quay Quay, Reckless' brother joined them, and together  
15 they were looking around for drug spots. That was what Baynes  
16 told you giving the background to the robbery, showing the time  
17 relationship, close criminal relationship that he had with  
18 Raymond Christian.

19           And how do you know this is true? How do you know  
20 that they were such close friends? You've seen ample evidence  
21 of that. First, you heard from other cooperators who said  
22 they've seen Baynes and Reckless together walking the streets  
23 of Newburgh. But, second, you don't have to take Baynes word  
24 for it, because you heard from Reckless himself. Now remember  
25 these are the Facebook postings that he, Reckless, made around

E8kzchr4

Summation - Mr. Bauer

1 the same time, March 2010. He says chillin with my shun  
2 Baynes. Shun is son. It shows you how close they were. Makin  
3 and Light House with Brazy Baynes. I'll get back to that in a  
4 minute. But remember Brazy, what Baynes told you it's really  
5 crazy, but Bloods, or people who are affiliated with the Bloods  
6 can't write that C for crazy, so we have to make it Brazy, B.

7 And remember July 30th, 2010, he wrote Makin with my  
8 left hand, Baynes. We asked what was left hand? He said my  
9 right hand, just another way of saying right hand. That's how  
10 close they were, ladies and gentlemen. That's what makes  
11 sense, that they were walking around conspiring to figure out  
12 what crime to commit.

13 You also heard from Reckless in those letters that he  
14 wrote to Anthony Baynes in jail. Remember those letters he  
15 wrote, loyalty to the bone, love is love, loyalty is  
16 everything, loyalty above all. And remember he also wrote, I  
17 love you like a brother -- actually, he wrote bother, but let's  
18 assume he meant brother.

19 Who else, ladies and gentlemen, would be in a better  
20 position to tell you about Reckless than Anthony Baynes? His  
21 best friends were Quay Quay and Reckless, and he told you that.  
22 How about the fact that Reckless was walking around Newburgh  
23 looking for a place to rob. Again, you don't just need to hear  
24 from Baynes, because you heard from Reckless himself. Remember  
25 on Facebook, star status; I got them goons on deck. Baynes

E8kzchr4

Summation - Mr. Bauer

1 told you what that meant. Star status is his gang, goons, as  
2 he defined goons, he said a person that's like, like that's the  
3 person that put in work, that does shootings and sorts of  
4 stuff. That's what Baynes told you. And on deck he said like  
5 that I got him on standby, like right here ready to go.  
6 Reckless is telling you here on this posting that he's got guys  
7 that are ready to commit crimes, ready to go.

8 Then, ladies and gentlemen, there is the last piece,  
9 which is they're going to rob a crack spot. You know that that  
10 is what Raymond Christian was all about. He sold crack for a  
11 living. We know that. How did we know that? Facebook again,  
12 ladies and gentlemen. Makin on Dubois getting money. We know  
13 what getting money means on Dubois. There is only one thing,  
14 because he never had any other job to make money. We know  
15 that. Getting money means hustling, selling crack. That's  
16 what he was about, that's what Baynes told you. The other  
17 evidence supports what Baynes told you.

18 So what's the next step in the robbery? After they  
19 picked 54 Chambers, Baynes, Quay Quay and Reckless went to 54  
20 or, sorry, to 38 Dubois Street. They went to Dubois Street to  
21 find L-1. Now you heard all about L-1 during this trial. L-1  
22 was the highest ranking member of the G-Shine stat, of the  
23 Bloods back then. And they went there to pitch him on  
24 participating in the robbery.

25 Now, again, you do not need to rely just on Baynes for



E8kzchr4

Summation - Mr. Bauer

1 this fact. You heard it from multiple cooperators that L-1 was  
2 one of the, what the leading member of the Bloods.

3 You heard from Danielle Williams. She had seen  
4 Reckless at that same house, at 38 Dubois Street, the same one  
5 where Baynes said they went. They had seen Reckless there.  
6 That's where they saw L-1 tell Reckless to serve a crack  
7 customer. And that's where Reckless told Bow Wow to sell a  
8 crack customer. He was there at 38 Dubois before, he was there  
9 again on December 15th. Mallory's also seen him there at 38  
10 Dubois Street. And then October 7th, 2010, remember Raymond  
11 Christian was arrested with a gun. The cops saw him with a  
12 bulge in his shorts. They chased him. Where did they chase  
13 him to? 38 Dubois Street. This gun, ladies and gentlemen,  
14 government Exhibit 132. He ran to the back of 38 Dubois  
15 Street, threw it. And remember that dog, the dog Ibor, had to  
16 go get this dog, get this gun, excuse me. It was in his mouth  
17 when he came out.

18 Baynes didn't just choose a random house. He chose a  
19 house where all the evidence points that Reckless went; again,  
20 corroboration across the board.

21 Let's talk about L-1 for a second. Like I said, he  
22 was the high, the big homie for the Bloods there in Newburgh.  
23 And you know that's true, ladies and gentlemen. You know that  
24 he had access to guns and he had access to soldiers, people he  
25 could tell to go commit a robbery. And you saw this because of

E8kzchr4

Summation - Mr. Bauer

1 the search warrant that was executed at L-1's house, just a few  
2 short months before the robbery. Remember what they found  
3 there. Government Exhibit 102, 357 magnum L-1's house, L-1's  
4 gun, right here. Ladies and gentlemen, what else did they  
5 find? Government Exhibit 104. Remember, this is the crack  
6 they found at L-1's house. Is there any doubt that L-1 was a  
7 crack dealer who had guns?

8           You also heard they participated the robbery because  
9 of what Jamar Mallory told you. Jamar Mallory told you after  
10 he got that call from L-1 and after the robbery took place,  
11 after Jeffrey Henry was killed, he confronted L-1. They  
12 confronted L-1 and he said that he was pissed off about being  
13 questioned by the police. And what did L-1 say? Did he deny  
14 being part of it? No. L-1 said, I sent them down there to do  
15 a robbery, not to do a shooting. Puts himself right there.  
16 Ladies and gentlemen, he just keeps building upon itself, not  
17 that you need any more. But remember what Barbara Morreale  
18 told you just yesterday, she knew L-1 pretty well. He'd  
19 stopped by her house to hang out, smoke weed back in the late  
20 2000s. He'd stop coming around so much around December 2010.  
21 But who showed up at her house December 14th just a few hours  
22 before the robbery? L-1. He said he had some business to take  
23 care of there in the apartment. Remember Barbara said that she  
24 didn't let him do it because she was putting down her kids.  
25 But there was L-1 right there across the street from 54

E8kzchr4

Summation - Mr. Bauer

1 Chambers. Coincidence, ladies and gentlemen? You know not.  
2 You know. And further evidence L-1 staking out the target of  
3 the robbery 54 Chambers Street.

4 So L-1 agrees. Reckless pitches him, L-1 agrees, I'm  
5 in, starts making phone calls. First thing he does starts  
6 making phone calls to recruit other robbers. And who came  
7 through, as Baynes told you? Reckless -- I'm sorry. Again you  
8 don't have to rely just on Baynes for this. And who came  
9 through, ladies and gentlemen? Reckless, Quay Quay and Baynes  
10 were already there, Bash, Bow Wow, and Gucci came right behind,  
11 Quay Quay joined later.

12 Now, how do you know that these seven guys were the  
13 robbery crew? I'm going to go each of these defendants in some  
14 detail a little later as to how the evidence shows that these  
15 three defendants were on this robbery crew. So for now let's  
16 just talk about one particular thing. Bash, Baby e, Bow Wow,  
17 Gucci, L-1, Kev Gotti, they were all Bloods. This case is not  
18 about the Bloods. You're not guilty of a crime simply by being  
19 a member of the Bloods. That's not what the government is  
20 arguing. But the fact these guys were all Bloods, is a  
21 critical piece of the puzzle here. They're all part of that  
22 G-Shine set. Remember L-1 was the high ranking member, and you  
23 heard evidence that Gucci came up, switched from Crips to Blood  
24 under L-1. You heard Kev Gotti also had status in the Bloods.  
25 And who was under him? Bow Wow.

E8kzchr4

Summation - Mr. Bauer

1           Because L-1 and Kev Gotti had that status, they could  
2 recruit people under them to do things, to make them do  
3 robberies.

4           You heard all this from Baynes, from Mallory, from  
5 McDermott and from Kev Gotti on that video. It just makes  
6 sense, ladies and gentlemen. They were all Bloods, they're all  
7 part of the same group with a hierarchy.

8           Next, L-1 agrees, makes some more phone calls. This  
9 time to get the chains. Remember what Baynes says? Baynes  
10 says they're standing on the porch outside 38 Dubois Street,  
11 and L-1 makes a call to somebody to get the chains. Five  
12 minutes later a woman shows up with a purse. L-1 says go put  
13 it in the mailbox or gestures to go put it in the mailbox, and  
14 there was the first gun.

15           We also know he made other calls, don't we? We know  
16 it from Jamar Mallory, and we know it from Kevin Burden.

17           We know it because we know that L-1 called Mallory and  
18 used that same word, I'm gonna bring some young boys, send some  
19 young boys over to get the chains.

20           Now, again, how do you know this is true? L-1 had  
21 guns. He stored them all around Newburgh. This was one of his  
22 guns. You saw it. Government Exhibit 102. He had access to  
23 guns. And you heard what Mallory told you. Mallory said that  
24 L-1, because he was dealing drugs all throughout the city,  
25 liked to store his guns throughout the city. And that's why he

E8kzchr4

Summation - Mr. Bauer

1 stored at least one of his guns at 260 First Street, where  
2 Mallory and Burden lived. Mallory also told you that at 260  
3 First Street where L-1 stored his guns, he would send people  
4 there, not just the young boys, Gucci and Bow Wow, but he would  
5 send young boys. He would send other people to come get guns.  
6 Who did he say? Women, Geneva, that's his baby's mother, and  
7 Christian, that's another woman, a drug customer, that's who he  
8 would send to get the guns. Lines up with what Baynes told  
9 about the woman dropping the gun in the mailbox

10 Now on the point about the how we all know, because  
11 you saw it in the video that L-1 called Jamar for the gun,  
12 let's address the points that defense counsel brought out,  
13 which is that Anthony Baynes did not recall on the witness  
14 stand telling the Newburgh cops three years ago that he -- that  
15 he had heard that L-1 called Jamar. We know that's true,  
16 ladies and gentlemen, L-1 did call, did call Jamar, but Baynes  
17 didn't remember saying that. And just this morning you heard a  
18 stipulation. The stipulation said that on that day, I think it  
19 was May 2011, he, Baynes, told the cops that Jamar was called.

20 Now, defense counsel has made a lot about Baynes and  
21 what he remembered about the lies that he told after he got  
22 arrested, and how he denied memory of some of the things.  
23 Ladies and gentlemen, ask yourselves, did he hide from you that  
24 he had lied to the cops? Did he hide from you the fact that he  
25 tried to protect himself and protect his friends? Absolutely

E8kzchr4

Summation - Mr. Bauer

1 not. He wore that on his sleeve, ladies and gentlemen. So  
2 what, he couldn't remember some of the lies he told three and a  
3 half years ago. That doesn't mean he was lying to you now, not  
4 when all the other evidence supports exactly that.

5 Now, let's think about the one thing, this one thing  
6 that he did remember; that he had called or that he had heard  
7 that L-1 called Jamar. I'll ask you this. If he was trying to  
8 lie in order to get some benefit out of the government, why  
9 would he not remember that point? If he and Mallory are  
10 concocting a big story, a conspiracy to frame these defendants,  
11 then why on earth would he leave that out, that one piece of  
12 direct overlap of their two stories? Because he didn't lie to  
13 you. He told you what it was, he told you like he remembered  
14 it, nothing more, nothing less.

15 He just didn't remember telling the cops that. That's  
16 all it is. And the fact that he didn't remember, ladies and  
17 gentlemen, shows you how credible a witness he was and not the  
18 other way around, as defense counsel has suggested.

19 What next? Now, remember, remember that on that porch  
20 there, after Bash and Bow Wow and Gucci came by, they all went  
21 inside 38 Dubois Street to talk about the plan. Remember  
22 Baynes wanted to go in with them, Baynes and Quay Quay. Bash  
23 said no. Remember Bash was Bash, it was not Bow Wow. Bash had  
24 fought with Baynes in the past, said I'm not going inside if  
25 Baynes is going inside, so Baynes stayed out. And actually

E8kzchr4

Summation - Mr. Bauer

1 then Baynes and Quay Quay went back to Baynes' house to play  
2 video games for a little bit.

3 So Baynes drops out of the story for a little bit,  
4 another thing where we do not have to rely on Baynes, because  
5 we know what happened next. Bow Wow and Gucci went over to 260  
6 First Street to pick up the guns.

7 And what did Mallory tell you? Mallory told you they  
8 get the phone call from L-1, sends the young boys to pick up  
9 the chains. Mallory goes upstairs where a gun is hidden in the  
10 garbage, old stroller in that garbage he told you. And he got  
11 that black gun, a 38 revolver, brought it downstairs. He told  
12 Kev Gotti, hey, these guys are coming over to get the guns.  
13 Gotti said my gun's not here. So he called his baby's mother  
14 to have his baby's mother bring it over wrapped in a shirt in a  
15 plastic bag. This is what Mallory told you. Then Mallory says  
16 that Gucci and Bow Wow show up; not anybody but Gucci and Bow  
17 Wow; that they show up, and when they show up they walk in,  
18 Mallory gives Gucci the black gun, then Gucci, Bow Wow and  
19 Gotti go downstairs to the basement where Kev Gotti gives Bow  
20 Wow the silver, the chrome revolver

21 (Continued on next page)

22

23

24

25

E8k9chr5

Summation - Mr. Bauer

1 MR. BAUER: (Continuing) They come back upstairs and  
2 Mallory saw the butts of their guns in their waistband  
3 adjusting them before they walked out. That's what Mallory  
4 told you.

5 Now, before we get to the video of Kevin Burden let me  
6 say a couple of things. First, Mallory made it clear to you  
7 that this was consistent with prior behavior. Bow Wow had  
8 borrowed guns from Kev Gotti before. Remember the story that  
9 he told you, that Mallory told you about how Bow Wow had come  
10 back to the house -- remember he was a little confused, was it  
11 right before the murder or right after, but I think he arrived  
12 right before -- that he came back with that same silver chrome  
13 gun and said this doesn't work.

14 And remember what Kev Gotti said? He said if that  
15 doesn't work put it to your hand and shoot it. They didn't do  
16 that. But what Kev Gotti did do is put the bullets in the  
17 barrel and shoot it out the window, pow, pow, a couple times.  
18 That's what he told you. That's a pretty detailed story.

19 He also told you about how Gucci had been borrowing  
20 things from him, from Mallory, namely crack cocaine. He'd come  
21 by and ask for money. Mallory wouldn't give him money but he  
22 would give him crack instead. This is Bow Wow and Gucci  
23 borrowing stuff from Gotti and Mallory, consistent with the  
24 testimony.

25 But then, again, you do not need to take Mallory's



E8k9chr5

Summation - Mr. Bauer

1 word for it because you heard from a witness. A witness who  
2 was not a cooperator. A witness who had know incentive to lie.  
3 No incentive to say anything other than what was true. You  
4 heard from one of their coconspirators. You heard from Kev  
5 Gotti.

6 Now I'm going to play a part of the video in a little  
7 bit. Let's go through some of the things that were said. Now  
8 remember at the beginning of that video, Mallory says remember  
9 those guys with the Joker, he starts naming Bow Wow, Gucci.  
10 Listen that was Mallory saying it at the beginning. It wasn't  
11 Burden. You can't hide from that. He was the one saying the  
12 names.

13 But Burden joins the conversation. He says, um,  
14 Baynes also, that's Besheltie's son. Then Mallory says, yeah,  
15 Baynes, Baby E and Gucci. And then Burden says, yeah, they all  
16 came in a cab and some shit.

17 So he's actively participating in this conversation.  
18 This is not him not believing that these guys were involved.  
19 And of course we know later on in the video he starts saying  
20 their names too. But to suggest that somehow Mallory fed these  
21 names to Burden. Think about the real world. Think about how  
22 conversations work. Think about this conversation in  
23 particular. When Kev Gotti pushed back. There was a little  
24 back-and-forth with Kev Gotti about who gave Bow Wow that gun.  
25 Mallory told you that it was Gotti. And in the video Gotti

E8k9chr5

Summation - Mr. Bauer

1 says: No, it was you. I gave you, Mallory, the gun. Mallory,  
2 you gave it to Bow Wow. There was a back-and-forth there.  
3 Burden is not some passive participant in this conversation.  
4 He's not adopting things simply because Mallory said it.

5 This is Burden -- this is Burden telling you exactly  
6 what happened. Mallory says: Hey, do you remember how Gucci  
7 was acting?

8 Burden says: Come on. Gucci was bragging about that.

9 Then Burden says: Gucci was basically what, exactly  
10 what L-1 wanted him to be, a kamikaze mission. He knew Gucci  
11 was going to be the one to go down. Cause he knew Gucci can't  
12 hold water. Burden talking about Gucci.

13 Now they're talking about Reckless. And Burden says:  
14 He just got knocked two weeks ago for like a robbery situation.

15 Now, then Mallory says: After those guys knocked that  
16 shit up, L-1 called and they came through. When we was down at  
17 the weed spot. Remember that?

18 Burden: Yeah, I remember exactly.

19 This is Burden remembering -- I don't have to say  
20 anything. He remembers exactly, ladies and gentlemen.

21 Now, Mallory says: I feel like Bow Wow didn't get  
22 questioned for nothing. Gucci probably got questioned. But he  
23 didn't say shit.

24 Burden says: Bow Wow smart bro. Right after that  
25 happened he disengaged from everybody. He stopped fucking with

E8k9chr5

Summation - Mr. Bauer

1     them.

2             And then Burden says: Gucci, Gucci came, basically  
3     Gucci came to see who was up there and L-1 came right behind  
4     him. Got to do the math, bro.

5             Then they both agree that they wasn't on point.

6             So when Mallory said he didn't know exactly what was  
7     going to a happen, this is Burden agreeing with him. This is  
8     not saying that they were completely oblivious. You heard in  
9     the video that they thought that there was something going on,  
10    there might be a jux -- which you heard was a robbery -- but  
11    they didn't know exactly where these robbers were going. And  
12    they certainly didn't know that they were going to shoot a gun  
13    and kill a man that day.

14            Now, finally, this is the part -- I won't dwell on it  
15    too much. Remember Burden said: We got the black joint. I  
16    had this chrome joint.

17            The black joint. That's Mallory's black .38 that he  
18    had. The chrome joint, that's Burden gun. That's his baby's  
19    mother's brother's gun.

20            They came later on. They started hunting around for  
21    the scats. Scats are guns.

22            You gave the scat to Bow Wow. Bow Wow went. They  
23    came straight upstairs.

24            And then remember what he says. He asks the group,  
25    who got up on my scat? Know what I'm saying? Then you like oh

E8k9chr5

Summation - Mr. Bauer

1 Gucci or somebody like that.

2 And Burden says: Hell, no. If it ain't my drop I'm  
3 not giving them my scat out there.

4 And Bow Wow was like all right I'll take your scat.

5 Your heard what a drop is. That is somebody who comes  
6 up under you in the Bloods.

7 Corroboration of exactly the relationship between Bow  
8 Wow and Gotti.

9 Ladies and gentlemen, you don't have to overthink it  
10 when you have another participant in the robbery telling you  
11 exactly what happened.

12 And then he says: All I knew was Bow Wow and Gucci.

13 "Bow Wow and Gucci." That's what he says.

14 We'll play that video later so I won't go through it  
15 here again.

16 Next, after Bow Wow and Gucci pick up those guns. You  
17 fast forward to where Baynes next sees them. He and Quay Quay  
18 went back and played video games for about an hour. And then  
19 they decided to look and see where everybody was.

20 They said they went to Dubois Street, back to where he  
21 saw them last. They weren't there. So then they went to South  
22 Miller. They weren't there.

23 So where did they meet up with them? On First Street  
24 between South Miller and Johnston. Who did he meet up with?  
25 Again, the same names. He said the name names over and over

E8k9chr5

Summation - Mr. Bauer

1 again. Reckless, Bow Wow, Gucci, Baby E, Bash. They all had  
2 dark clothes on. They all had masks. Bandannas or half-ski  
3 masks.

4 He said at that point, he only knew that some of them  
5 had guns. He didn't know they all had guns. He saw much  
6 later, obviously, they all had guns. But at that point he  
7 didn't know which people had guns. But most importantly he  
8 said that he and Quay Quay were the people who didn't have  
9 masks or guns. And that's why Bow Wow said: Why don't you be  
10 lookouts then.

11 Now let's talk about the number of robbers. Because  
12 you heard from Baynes that there's seven, right? He names the  
13 seven -- same seven people time and again.

14 Mallory told you six. He named everybody but  
15 Quay Quay.

16 Barbara yesterday told you somewhere between six and  
17 eight.

18 Akinto. Akinto Boone. He told you seven. There was  
19 Marshall Williams who spoke to Sergeant Carrion. He said more  
20 like five. And Tarrence said five or that's all he saw when  
21 they first came in the apartment.

22 So there's a little variance in numbers there. Is  
23 there any real question, ladies and gentlemen?

24 Ms. McInerney, can you cue up Government Exhibit 252.

25 And this is the pole camera, ladies and gentlemen.

E8k9chr5

Summation - Mr. Bauer

1 We're not going to watch them all again. Don't worry.

2 We're just going to look at the west-facing view.  
3 Could you it up to the 17:10, mark.

4 What do you see during this video? You're going to  
5 see seven people walking down the street. I will give you a  
6 little preview about five minutes from now. You're going to  
7 see seven people running right back up.

8 There's really no question, ladies and gentlemen.  
9 There is no question that there were seven robbers. And  
10 there's really no question that they met up on First Street,  
11 just like Baynes told you, because this pole camera was  
12 situated right at the corner of Lander and First.

13 One, two, three, four, five, six, seven, ladies and  
14 gentlemen. Seven robbers.

15 We can stop it, Ms. McInerney.

16 Here's a still shot, again, of the robbers. Here's  
17 the first four. Here are the last three. Again, seven.

18 Now, ladies and gentlemen, Mr. Baynes was shown some  
19 of the video, shown some of the pole camera. And he told you,  
20 he said -- that's not seven there, but I don't know exactly who  
21 is who. It's kind of hard to tell in the video. I know which  
22 one I am because I remember what I was wearing and I didn't  
23 have a mask on. And he pointed himself out here on this slide  
24 on 252N. He's the guy on the right.

25 And then on the video coming back, he points himself

E8k9chr5

Summation - Mr. Bauer

1 out again, again. It's 2520. He's on the right.

2 Now, ladies and gentlemen, that is the exact person  
3 who Jamar Mallory picked out and said that is Besheltie's son.  
4 That's Government Exhibit 253.

5 Now remember what Jamar Mallory said about seeing this  
6 video. He got a lot of questions from defense counsel. Did  
7 you identify each of these people? He said no I simply --  
8 maybe he did say identify. He didn't understand the word  
9 "identify." But what he said was that it looked like them,  
10 based on the clothes they were wearing, or how they were  
11 running, because I know these guys from Newburgh. He didn't  
12 oversell what he knew here. He just credibly told you that  
13 there were similarities between the people on the video and the  
14 people he knew, Reckless, Bow Wow, Gucci, other people. And  
15 particularly think about the Gucci one. He said that he picked  
16 out Gucci, or he said that could be Gucci because he was  
17 wearing a black leather jacket and a gray scarf. The same  
18 exact outfit that Bow Wow -- I'm sorry -- that Gucci was  
19 wearing when he picked up the guns, not more than an hour  
20 before.

21 Okay. They walked down First Street. They hit  
22 Chambers. Remember Akinto says they stay at the corner for a  
23 minute. And they actually walk a little bit past Chambers,  
24 then come back. Akinto sees this little huddle of what he says  
25 were young-looking kids because they are all in a pack dressed

E8k9chr5

Summation - Mr. Bauer

1 like younger kids. And originally Akinto thought they might be  
2 robbing the weed spot next door, 56 Chambers. But then they  
3 walked past and they walked up to them, 54 Chambers.

4 Again, that's exactly what Baynes told you. You don't  
5 have to rely just on Baynes because Akinto told you that and  
6 Barbara, from her window, up there on 53 Chambers Street, she  
7 saw this group of six to eight robbers make a right on Chambers  
8 and approach the men standing out in front of the house.

9 Who was in front of the house? You heard it was  
10 Akinto and you heard it was that guy Marshall Williams, a crack  
11 customer, MA, they were out there. Now Barbara, if you  
12 remember, she also said she thought she saw Joker out there. I  
13 think we all know that that's not true. But she also said she  
14 don't know who Joker was. Akinto said he wasn't there at the  
15 time when -- Akinto said that Joker wasn't there at the time  
16 that Akinto was there. But she saw people out there and I mean  
17 who can really blame Barbara for a situation like that,  
18 conflating exactly when Joker came to the scene.

19 Now who had the guns, ladies and gentlemen? Step  
20 eight. Who had the guns? Baynes was clear on this. When they  
21 pulled out their guns at 54 Chambers Street and Akinto and  
22 Marshall Williams, all five of the people that Baynes and  
23 Quay Quay met up with, had guns: Reckless, Bow Wow, Gucci,  
24 Bash and Baby E.

25 That's what Akinto told you too. Akinto said that



E8k9chr5

Summation - Mr. Bauer

1 they all had guns. Now, when he clarified, he said he didn't  
2 get a great look at everybody. But he said basically -- or  
3 maybe he didn't say basically -- he said they all had guns but  
4 he didn't get a great look at everybody. Would you it surprise  
5 you to think when you get semicircled, or he used the term  
6 half-moon around you, and there's at least five guns being  
7 pointed at you and seven guys in total that maybe you think  
8 everybody has a gun?

9 Ladies and gentlemen, the evidence is clear, that at  
10 least five people had guns. And the evidence is clear that at  
11 least those three guys had guns.

12 Now, what guns did they have? We know that there was  
13 a black .38 revolver. We know there was a chrome revolver.  
14 But, unfortunately, we don't know the other guns. We can't  
15 pretend that we do. We know those two guns.

16 We also heard from Akinto that the person who first  
17 pulled out the gun on him, when he said, when he realized it  
18 was a robbery, he goes "oh damn" and he -- and the person who  
19 pulls out the gun goes "that's right" that was a chrome gun as  
20 well.

21 Now, ladies and gentlemen, we don't know what the  
22 other guns were in the case. What we also don't know is if  
23 they traded guns beforehand. We don't know if Bow Wow and  
24 Gucci switched or they switched with Bash. We don't know.

25 MR. GOLTZER: Objection. Improper argument. Based on

E8k9chr5

Summation - Mr. Bauer

1 nothing in the record.

2 THE COURT: Overruled.

3 MR. BAUER: I'll get back to that in a moment anyway.

4 So what happened? They all pull out their guns.

5 Again, there is ample evidence in this record to show you that  
6 these guys, these three defendants had guns.

7 Next. They enter 54 Chambers. They force Akinto into  
8 the house. Barbara told you how it happened. Baynes told you  
9 how it happened. Akinto told you how it happened. And  
10 Tarrence told you. Tarrence told you he was cooking in the  
11 kitchen when they came in. When they forced Akinto, through  
12 the hallway, into the back living area, through the kitchen  
13 towards the bathroom.

14 Let's walk through here. So this picture is taken at  
15 the interior door. After they've already entered the house.  
16 They march Akinto straight to the back, into this kitchen area  
17 where Tarrence was cooking. And in the back there, that's the  
18 bathroom where they tried to get Akinto to go.

19 Remember, what Akinto and Tarrence were telling you.  
20 Not just Baynes. But what Akinto and Tarrence were telling you  
21 about where all the robbers were.

22 First of all, they said it was chaos in there. People  
23 screaming to get down, to give it up. And they said that --  
24 some robbers stayed in that living room kitchen area. Akinto  
25 used the number three or four in that area. Others went in the

E8k9chr5

Summation - Mr. Bauer

1 bedroom, Tarrence's bedroom, where Tarrence's brother and the  
2 other people were. That's how many robbers were there. And  
3 what Baynes says is that he and Quay Quay stayed by the door  
4 until they heard a commotion. That's when they peeked out and  
5 they saw what was going on.

6 What did they say what was going on? Their buddy,  
7 Quay Quay's brother, Baynes' left-hand, Reckless, struggling  
8 with Akinto over his gun.

9 Now Baynes tells you that he ran to Reckless' aid, he  
10 and others. He used the pronoun "we." We trying to pull them  
11 away from one another. They were trying to grab the man. He  
12 said -- he said they had a gun in the air, fighting for the  
13 gun. And then Reckless lost his gun.

14 Now, remember, what did they do with Tarrence? They  
15 took Tarrence and they said lie down. Put your face against  
16 your bedroom wall on the left.

17 He doesn't see exactly what's going on here because  
18 his head is facing that way. And they try to put Akinto into  
19 that bathroom. Then he gives Tarrence a look, he says. And  
20 then he sees that guy in the bathroom, where the guy says shh.  
21 He says, come on, they're right behind me. And then he makes  
22 his move. And he grabs Christian. And they're struggling with  
23 the gun in the air, just like this.

24 Now what does he say is happening? First of all, he  
25 says the guy he's struggling with has a mask on. What kind of

E8k9chr5

Summation - Mr. Bauer

1 mask? A half-mask? What kind of half-mask? One made of  
2 Gortex. One that straps in the back. One, ladies and  
3 gentlemen, I submit, looks a lot like this, Government Exhibit  
4 3.

5 During the fight what does Akinto tell you happens?  
6 They're fighting. They're struggling. He says the guy he's  
7 wrestling with is skinny. He says the guy he's wrestling with  
8 is weaker than him.

9 Ladies and gentlemen, use your common sense. You saw  
10 Anthony Baynes. Everyday you've seen Reckless. Anthony Baynes  
11 was stocky, ladies and gentlemen. Reckless, not so much. Keep  
12 it in mind, ladies and gentlemen.

13 What does he do to the person he's wrestling with?  
14 What does he do to Reckless? Headbutts him. Never headbutt  
15 anybody in his life. But he headbutt him in his cheek.

16 We'll obviously talk about the mask in a minute but  
17 let's just remember what they found on that mask. They found  
18 blood. Whose blood? Reckless' blood.

19 Now, the gun is lost. Chaos. Chaos ensues. Because  
20 Akinto has the gun and he starts shooting back at the robbers.  
21 At that point all amidst the chaos Baynes gets stabbed and then  
22 Tarrence Smith gets shot. You remember hearing all about that  
23 because you heard from Baynes and you heard from Smith. You  
24 also heard from Akinto. You heard from Barbara that she heard  
25 all the gunshots. And you saw the shell casings, ladies and

E8k9chr5

Summation - Mr. Bauer

1 gentlemen, you saw the bullets, everything that was at the  
2 crime scene that supports the fact that there was a shootout  
3 there. You also saw the knife, the same knife that was used to  
4 stab Anthony Baynes. And Tarrence Smith told you he stabbed  
5 Anthony Baynes.

6 Now, along the way Reckless lost his mask. If you  
7 remember what Baynes said, he said that at some point, and he  
8 only really registered with it when they were in that hallway,  
9 after his fight with Akinto, that's when he saw Reckless  
10 without a mask. Keep that in mind.

11 Now, what does Akinto say actually happens? He's got  
12 the gun. He starts firing. They start running this way, into  
13 the hallway, towards the front door and then he and Tarrence  
14 hide behind this wall here. Government Exhibit 95K. They're  
15 hiding behind that wall.

16 Now, you heard from Tarrence Smith that he thinks he  
17 stabbed the robber who was struggling with Akinto. That's what  
18 he said. That's what he thought. He didn't waiver from that.  
19 Defense counsel, through their questions, will undoubtedly  
20 point to that and say that it was Baynes, the guy he stabbed,  
21 who was wrestling with Akinto and not Reckless.

22 Don't be distracted, ladies and gentlemen. As I said,  
23 Tarrence said there were a number of other robbers running  
24 around that house. He said he was lying down facing away from  
25 where Akinto was.

E8k9chr5

Summation - Mr. Bauer

1 Baynes told you he came to Reckless' aid. Baynes  
2 didn't hide from the fact that he was right there, in there  
3 coming to Reckless' aid. And he said "we." Multiple people  
4 did that.

5 Remember what Tarrence said about the mask. Tarrence  
6 said the guy who Akinto fought with had a mask on when he went  
7 into the bathroom. But the guy he stabbed, he wasn't sure if  
8 he had a mask on.

9 But then there's Akinto, ladies and gentlemen. Akinto  
10 says the same thing that Baynes tells you, which is why you  
11 should not be distracted. Don't be distracted from the DNA.  
12 But don't be distracted from the facts as you've heard him.

13 Akinto says that he was fighting with one guy over the  
14 gun and then other people came to his aid. In particular, he  
15 remembered somebody with that same silver chrome revolver  
16 that's pulled out on him in front of that house, he remembered  
17 that chrome revolver hitting him in the head. Remember he was  
18 pointing to those scars on his head.

19 The point being, ladies and gentlemen, it was chaos.  
20 There were robbers everywhere. And what Akinto said is that he  
21 was arm's length basically from Tarrence when he was lying  
22 down. Tarrence said the same thing. Very close to Akinto.

23 And just use your common sense about what's happening  
24 here. This is not a huge -- it's not a palace. There's seven  
25 robbers and a number of victims in a very small space.

E8k9chr5

Summation - Mr. Bauer

1 Tarrence, Akinto, they weren't accounting for every single  
2 robber. They were just trying to survive. So don't be  
3 distracted. Don't be distracted from the DNA that shows you  
4 exactly what happened.

5 What happens next? The robbers are in the hallway  
6 trying to get out and they struggle with Jeffrey Henry at the  
7 door.

8 Remember what Baynes says. They're all huddled inside  
9 the hallway, Bash and Bow Wow, and then Gucci. And they're all  
10 taking turns shooting around the door, as the other one pulls  
11 the door opened.

12 Remember, from the inside the doorknob was on the  
13 left. So it opened into the house to the right. Remember what  
14 Baynes showed you. He gestured. This is how they were  
15 shooting. Whenever they had a opportunity. Reach around.  
16 Just matches with the physical door. He was there. He  
17 explained exactly what was happening.

18 Again, you do not have to rely on Baynes for this part  
19 of the story. Barbara told you how the door was struggling  
20 back and forth. Akinto and Tarrence is telling you exactly  
21 where these guys are. This isn't just Baynes. Mallory also  
22 told you what Gucci told you about the struggle at the door.  
23 It's not just Baynes.

24 Here is Baynes' diagram, though, Government Exhibit  
25 259. And you know this is what he did back in 2011. Remember

E8k9chr5

Summation - Mr. Bauer

1 what he said about this. The bottom, Bash and Bow Wow, right  
2 by the door. There's Jeffrey right on the other side of the  
3 door. There's Baynes next. Quay Quay and Gucci. Then  
4 Reckless. And then Baby E. He said Baby E was shooting back.  
5 Akinto was shooting in one direction. Baby E was shooting  
6 back. He said that Gucci started where he drew, right here.  
7 But that at some point he came to help Bash and Bow Wow, to  
8 help them because they were struggling with Jeffrey Henry.  
9 They weren't able to get the door opened. So Gucci moved and  
10 changed positions.

11 Now, remember about this hallway. What Akinto told  
12 you. What Baynes told you. It was a small hallway. Akinto  
13 said it was seven to eight feet deep.

14 There's seven robbers in that small little hallway.  
15 Bumping up against one another, according to Baynes. It was a  
16 tight space.

17 Baynes was bleeding so much from that stab, the stab  
18 in his back. He was bleeding down his legs so much that he  
19 thought somebody was peeing on his leg.

20 Is there any wonder that Bow Wow was covered in blood  
21 after this? It wasn't Jeffrey Henry's blood on him. There is  
22 no evidence in the record here to support that. But there's  
23 every piece of evidence to show a very fair, very reasonable,  
24 very fact-based inference that it was Baynes' blood on  
25 Whitaker.



E8k9chr5

Summation - Mr. Bauer

1           Let's look at -- I'm sorry. Let's look at 95D.  
2 Remember he said he was stabbed in the back. They're facing  
3 the door obviously trying to get out. Where is that blood  
4 smear? It's on the right. Meaning he's swiveling his body in  
5 there.

6           What do you think is going on in this small tight  
7 space? They're trying to get out. They're moving all over the  
8 place, ladies and gentlemen.

9           So the fact that his blood is on the right side of  
10 that wall shows you they weren't standing perfectly still.  
11 They were bumping up against each other.

12           What was Jeffrey Henry doing during all of this? He  
13 was holding that door on the other side. Holding it with one  
14 hand and using the other hand to call 911. How do you know  
15 that? Based on the 911 call and based on the fact that Barbara  
16 Morreale told you exactly that.

17           Now at some point Baynes says that they're able to get  
18 the door opened enough to get a shot out. Baynes says he hears  
19 a scream. The door frees up. And when they get out -- when  
20 they get outside, there's a man huddled against the wall,  
21 having been shot.

22           Remember, again, he said Bow Wow, Bash and Gucci  
23 taking turns trying to do this.

24           So now what I'd like to do is show you how Baynes is  
25 telling the truth there too. You heard it from Barbara.

E8k9chr5

Summation - Mr. Bauer

1 Barbara described it, right? Barbara said she saw -- she saw  
2 the smoke from the gun in Jeffrey Henry's face while he was on  
3 911. So at this time what I'd like to do is play Government  
4 Exhibit 281 again, which is Jeffrey Henry's 911 call.

5 (Audio recording played)

6 You heard the screams there. And you heard what  
7 Barbara said. Wouldn't be my words. Barbara's words. She  
8 said the screams sounded like -- like a squealing pig. Let's  
9 face it, ladies and gentlemen, that's what it sounds like.

10 The facts line up across the board. Something like  
11 this. That's why you don't have to believe just Anthony  
12 Baynes.

13 What did Dr. Ely tell you, the medical expert, about  
14 how Jeffrey Henry died? Remember, she said there were two  
15 shots. One shot traveled right to left. The other one  
16 basically straight down. Both of them, though, downward.

17 The right to left makes sense. The doorknob was right  
18 here. He -- on the right side of his body. So if they're  
19 reaching around, that's how -- the first shot would come.

20 And the downward. Again, let's look at -- now, look  
21 at Government Exhibit 92B as to where Jeffrey Henry was  
22 standing. Look at the front of that door. It's two steps. So  
23 he -- and Barbara said he was leaning up against one of those  
24 steps for leverage. So, what you have here is Jeffrey Henry  
25 beneath the shooters. It makes perfect sense that this is how

E8k9chr5

Summation - Mr. Bauer

1 he was shot. Downward from right to left.

2 Now the robbers flee the scene. I won't play the 911  
3 call again. But you heard at the very end of that 911 call  
4 after the screaming, after that second shot, the second shot  
5 that stopped the screaming, you heard two voices. The first  
6 one said something like, "let's get the hell out of here" and  
7 the second one said something like "check his pockets."

8 And you know that once Jeffrey Henry let go of that  
9 door everybody fled out. Baynes said he didn't remember which  
10 one the actual shooter was. The first one would be out. The  
11 other two who were helping him open the door were kind of stuck  
12 behind the door. So Baynes was the second one out. And he saw  
13 a man huddled by the side of the door, having just been shot.

14 What -- and then what happened? You heard it from  
15 everybody. You heard Barbara told you, Baynes told you, and  
16 the pole camera told you. That they ran back on Chambers  
17 Street toward First and then up First Street. Remember what  
18 Mallory told you. Mallory told you the same thing -- then  
19 Gucci turned on Lander Street back towards his house.

20 So let's play briefly, Ms. McInerney, Government  
21 Exhibit 252 again. That is the east view of the pole camera.  
22 We'll start it at the 25-second mark.

23 (Video recording played)

24 One, two, three, four, five, six.

25 Did I miss the seventh? I think the first one might

E8k9chr5

Summation - Mr. Bauer

1 have -- can we start it again.

2 (Video recording played)

3 Well from this angle I think there are six but we did  
4 see the other angles where you saw the seventh one as well.  
5 Ladies and gentlemen, I don't think there's any question about  
6 it.

7 Now, on that 911 call you heard "check his pockets."  
8 And then don't forget what you heard after that. You heard  
9 "check his pockets" and then you heard the phone hang up. Was  
10 Jeffrey Henry in the condition to be hanging up a phone, a  
11 phone that he called 911 for? Use your common sense, ladies  
12 and gentlemen. What happened? A robber took that phone out of  
13 his hand and hung it up. Took his phone. Did they get his  
14 crack? No. They just shot the man. They're fleeing from a  
15 botched robbery. Did they have time to go through his pockets?  
16 No. But the phone was right there and they grabbed it.

17 And lastly, ladies and gentlemen, Jeffrey Henry dies.  
18 You heard that Elena Gardner saw Jeffrey Henry lying on the  
19 street in front of 45 Lander Street. He said he had been shot.

20 You heard William Lahar say he showed up there. The  
21 man was still alive at that point. He said his name was Jeff.

22 And you heard from Dr. Ely exactly how he died.

23 And when he was found, ladies and gentlemen, just in  
24 case there was any question as to what this robbery was about.  
25 What was in his pocket? Government Exhibit 57, crack cocaine.

E8k9chr5

Summation - Mr. Bauer

1 Jeffrey Henry sold crack at 54 Chambers. Just like Akinto  
2 Boone. Just like Tarrence Smith. That's what the robbery was  
3 about. I don't think there's any serious dispute about that.

4 So, ladies and gentlemen, here we are with this wall  
5 of evidence.

6 What was the point of the brick wall? What was the  
7 point of all those red circles. To show you this isn't a case  
8 that's just on Anthony Baynes or just on Jamar Mallory. Brick  
9 and mortar. Brick and mortar. All of the evidence comes  
10 together, ladies and gentlemen, to show you exactly what  
11 happened. This isn't Jenga. You can try and attack one brick  
12 here or there but that wall will not crumble. Not when there's  
13 so many other bricks. Not when those bricks are credible and  
14 they are stuck together with the mortar of corroboration. The  
15 wall is strong. The wall is too high for these people to  
16 overcome.

17 So that's the story, ladies and gentlemen. What  
18 Baynes told you, what Mallory told you, what everyone tells  
19 you.

20 Now I want to dig into the big question, the ultimate  
21 question, were these three defendants part of the crew that  
22 robbed 54 Chambers and Jeffrey Henry. The answer,  
23 unquestionably yes. So let's go one by one.

24 Left start with Raymond Christian, Reckless. How can  
25 you know beyond a reasonable doubt that he was there? Starting

E8k9chr5

Summation - Mr. Bauer

1 point has to be with Anthony Baynes, Reckless' good friend.  
2 And he told you exactly what Reckless did that day. The  
3 robbery was Reckless' brainchild. Reckless is the one leading  
4 the charge to find a crack spot to rob. It was Reckless who  
5 approached L-1, the highest ranking member of the Bloods. It  
6 was Reckless who was one of those seven robbers that pulled a  
7 gun on Akinto and Marshall. It was Reckless who had his gun  
8 taken from Akinto. And that's when Baynes came to his aid only  
9 to get stabbed himself. And it was Reckless who had that  
10 half-mask on.

11 Now, but then again you also heard directly from  
12 Reckless. He didn't have to take the witness stand here, of  
13 course, ladies and gentlemen. That was his right. No adverse  
14 inference can be drawn against him because he didn't take the  
15 witness stand. But you heard from him in other ways. You saw  
16 what he said on Facebook. He said "goons on deck." You heard  
17 what that means. You also heard exactly what his gang  
18 situation was. No doubt, he was Star Status. He wasn't a  
19 Blood. But he was a 550. You heard that. 550, you heard,  
20 meant that he was neutral but affiliated, associated, friendly  
21 with the Bloods.

22 You saw what he wrote on Facebook. Brazy Baynes.  
23 Because you can't write a C for Crips if you're connected with  
24 the Bloods. You saw another Facebook where he used the term  
25 peter-rolled. You heard what that meant. That's a Blood term

E8k9chr5

Summation - Mr. Bauer

1 for killing somebody. He may not have been a Blood, but you  
2 heard from his mouth, or in this case his fingertips what his  
3 gang affiliation was.

4 You also heard that he loves guns. You saw posting  
5 after posting about how he loves them gun sounds. He wrote  
6 that one post, we'll talk about later, where he listed the .22  
7 and the 9-millimeter; that he changed the lyrics of a rap song,  
8 the rap song that says desert eagle and chopper. But Reckless  
9 didn't have a desert eagle or a chopper. He had a .22 and a  
10 9-millimeter. So he switched them to match his guns.

11 That really can't be in dispute, right? Reckless  
12 loved guns. He carried them regularly. We'll talk about it in  
13 a bit, what all the cooperators said about that. Cooperator  
14 after cooperator telling you that he saw them -- that they saw  
15 him with guns.

16 But how else do you know that? Because back in 2010  
17 alone, the same year as the robbery, Raymond Christian was  
18 arrested, not once, but twice with a gun. You saw those guns,  
19 ladies and gentlemen. There was a little two-shot Derringer,  
20 here, Government Exhibit 121. And you saw the other gun,  
21 Government Exhibit 132, the one that he threw behind L-1's at  
22 38 Dubois Street.

23 There's another way that you heard from Reckless. Not  
24 directly. But Jamar Mallory told you what he heard Reckless  
25 say after the murder. It was one or two days later. After he

E8k9chr5

Summation - Mr. Bauer

1 had been questioned by the police. And he stopped by 260 First  
2 Street to talk to Kev Gotti. He said he thought someone was  
3 snitching. And he said that he had told the robbers, told his  
4 goons that there was a chance someone was going to die that  
5 night, the night that Joker was killed.

6 So he wasn't wrong. Someone did die. But he's  
7 putting himself, that is Reckless putting Reckless right in the  
8 middle of that robbery, ladies and gentlemen.

9 Let's talk about the mask. Baynes told you -- I'm  
10 actually going to take the mask out.

11 Baynes told you that he was wearing a half-mask. He  
12 said some of the robbers had masks to go over their heads and  
13 others have masks that strapped in the back. Reckless was  
14 wearing the half-mask that tied in the back. Here's the mask.  
15 Baynes was spot on, ladies and gentlemen.

16 How about Akinto? Akinto. It was a velcro mask,  
17 Gortex, he said. I'm feeling it, you're not. I don't know  
18 exactly what Gortex is but this is pretty close, ladies and  
19 gentlemen.

20 Now Baynes testified that as far as he can remember  
21 the mask only went over his nose. And as you saw during the  
22 trial when Daniel Myers opened it up, it goes above the nose,  
23 obviously it does. Can't hide from that.

24 I submit to you, ladies and gentlemen, that is a  
25 minor, minor inaccuracy.



E8k9chr5

Summation - Mr. Bauer

1           It's those types of inaccuracies that, again, show you  
2           that Anthony Baynes wasn't trying to overreach here. He was  
3           trying to tell you what he remembered.

4           We didn't put the mask in front of him first and say:  
5           Is this Reckless' mask? He just told you what he remembered it  
6           to be, exactly how high it went up on his face. He got it  
7           right. It was a half-mask strapped in the back. That's the  
8           big point.

9           By the way, if Baynes is wearing this mask, as defense  
10          counsel has tried to suggest, wouldn't you think he might know  
11          a little more exactly how high up it went on his face.

12          But, again, you do not need to take Anthony Baynes or  
13          Akinto Boone's word for who was wearing that mask that night.  
14          You heard from the DNA expert, Daniel Myers, Raymond  
15          Christian's DNA was on the inside of this mask; this mask found  
16          at the crime scene, with the blood, a  
17          one-in-three-hundred-billion chance that it was anything other  
18          than that he, Raymond Christian, was the major contributor to  
19          this mask.

20          Ladies and gentlemen, I only ask that you use your  
21          common sense when it comes to this mask. The evidence against  
22          Raymond Christian is overwhelming. And why? If for no other  
23          reason because his DNA was on a mask at 54 Chambers Street.  
24          Pure and simple. We can talk about the technical analyses done  
25          by Daniel Myers to conclude that it was his DNA on there, but

E8k9chr5

Summation - Mr. Bauer

1 all you need to know is that it is within a certainty of one in  
2 three hundred billion that Raymond Christian wore this mask.

3 Defense cannot escape this. This is his mask.  
4 They've already tried to distract you with the theory that  
5 maybe he loaned the mask and it was Baynes or his brother  
6 Quay Quay who wore the mask that night. But ask yourselves,  
7 ladies and gentlemen, does that make any sense?

8 First of all, as you heard, Baynes' DNA was on this  
9 mask too. Part of the mask. Don't be distracted by this,  
10 ladies and gentlemen.

11 Let's look at 95D where this mask was recovered. You  
12 see it on the ground there. You see it on the ground right  
13 below where Baynes' blood is smeared all over the wall,  
14 dripping down. You see Baynes' blood dripping right next to --  
15 right next to the mask. Is there -- is it any surprise that  
16 there's a little DNA of Baynes' on here?

17 Now, it was on the outside. Baynes' DNA was on the  
18 outside. Not on the inside. Only one person was on the  
19 inside, ladies and gentlemen. Only one major contributor and  
20 that was Reckless.

21 Mr. Greenfield also asked a number of questions of  
22 Mr. Myers inferring that it's Quay Quay, not Reckless, was  
23 wearing that mask. Quay Quay could have been a minor  
24 contributor. And that his DNA had been degraded off the mask  
25 during the whole two months that it was sitting around before

E8k9chr5

Summation - Mr. Bauer

1 it had been analyzed.

2 Or maybe it was Quay Quay's mask all along. It's not  
3 really clear. Just throwing it up there. That it was not  
4 Reckless.

5 They were grasping ladies and gentlemen. First of  
6 all, Daniel Myers rejected this theory out of hand. He's your  
7 expert. He rejected it out of hand. He said, and I quote,  
8 that Reckless was the major contributor and any similarities  
9 between the DNA on the mask and that of Quay Quay's was  
10 inconclusive at best.

11 Mr. Greenfield worked very hard to get Mr. Myers to  
12 say that you can't rule out the possibility of Quay Quay's DNA  
13 being on the mask. Yet, he had Mr. Myers come down and circle  
14 all those things in red pen; that he can't exclude the  
15 possibility that maybe Quay Quay's DNA was also on the mask.  
16 Mr. Myers, again, rejected it out of hand. Those numbers he  
17 was circling, meaningless. It was a  
18 one-in-three-hundred-billion chance that it wasn't Reckless on  
19 that mask. That's all you need to know.

20 Finally, I'll remind you that Daniel Myers said that  
21 his swab of DNA from the inside of the mask had blood on it, on  
22 the cheek area. Remember, again, what Akinto Boone told you.  
23 He had just headbutted the guy wearing the mask. Now there's  
24 blood on the inside. If not Reckless, how did blood get on the  
25 inside of the mask? Common sense.

E8k9chr5

Summation - Mr. Bauer

1 Ladies and gentlemen, defense counsel wants it both  
2 ways. DNA expert Myers was wrong; wrong about Reckless' DNA on  
3 that mask. But about Baynes? How about that? Was he right or  
4 wrong about that? They're perfectly fine with his expertise  
5 when it comes to testing Anthony Baynes, but not about their  
6 client. And that just doesn't hold water, ladies and  
7 gentlemen. Use your common sense. If you do that, you'll know  
8 beyond a reasonable doubt that it was Raymond Christian who was  
9 there at 54 Chambers that night trying to rob those drug  
10 dealers with this mask on.

11 Let's talk about Glenn Thomas, Gucci. Again, we'll  
12 start with Baynes. Baynes is clear, crystal clear that Gucci  
13 and Bow Wow were right in the thick of that robbery. They are  
14 at L-1's house at Dubois, inside 54 Chambers, first behind  
15 Baynes in the hallway, and then up in front of Baynes, with  
16 Bash and Bow Wow.

17 Now, much has been made by defense counsel about  
18 Anthony Baynes' inconsistent statements regarding lies that he  
19 told the police when he was first arrested. Defense counsel  
20 spent almost an hour with you this morning reading you some of  
21 those lies, of which he denied remembering or denied saying on  
22 the witness stand. Now I'll address those lies and defense's  
23 strategy to hang their hats on those lies in a moment.

24 For now let's talk about the delay in Baynes naming  
25 Bow Wow and Gucci. Because Baynes told you in no uncertain

E8k9chr5

Summation - Mr. Bauer

1 terms that it wasn't until his fourth or fifth meeting with  
2 police that he named Guch and Bow Wow. Was he lying when he  
3 finally named them?

4 Think about who he originally named. He named Bash  
5 and Baby E, two people he barely knew. One who he didn't get  
6 along with. You heard. He fought with Bash. He named  
7 Quay Quay and Reckless originally but didn't put them in the  
8 robbery right away. Trying to protect himself. Trying to  
9 protect his friends. And no mention of Bow Wow and Gucci.

10 But by the time he gave that full list of robbers in  
11 May of 2011, he filled it in with all seven robbers. Had to be  
12 seven. Were Bow Wow and Gucci random? Was it just a haphazard  
13 name out of a hat, ladies and gentlemen? Of course not.  
14 There's a mountain of evidence showing you exactly, exactly  
15 what their role was.

16 Ms. McInerney, can we pull up the part of the  
17 Burden/Mallory video -- we're only going to do one excerpt,  
18 ladies and gentlemen. We're going to do excerpt 4. It starts  
19 at the 20:50 mark. We went through a little bit of what they  
20 said but it's important to hear and to see Kevin Burden talking  
21 throughout this about what he -- what he and Jamar Mallory say  
22 about what Bow Wow and Gucci were doing at that robbery.

23 (Audiovisual recording played)

24 Ladies and gentlemen, all the questions about the  
25 incentives that our cooperators, our witnesses had to lie, they

E8k9chr5

Summation - Mr. Bauer

1 don't apply to Kevin Burden, ladies and gentlemen. Ask  
2 yourselves why would he lie in this video? There is no answer  
3 to that.

4 So just in case you felt uncomfortable relying on  
5 Jamar Mallory, which you shouldn't because everything he said  
6 is corroborated, you have Kevin Burden.

7 Now what else do you know, though? You did hear from  
8 Jamar Mallory about what Gucci did the night after the robbery.  
9 He came over with beers and he came over with that black .38  
10 revolver, again. And he told J-Mark what happened. He ran  
11 through all the people that were down there at the robbery.  
12 Remember, he didn't name Quay Quay. That's why J-Mark only  
13 knew six of the seven robbers. But he said that he went down  
14 there with the robbers, that the robbers didn't respect what  
15 was going on, didn't respect the robbery, then a shootout  
16 happened. Joker died. That was Gucci putting Gucci in that  
17 robbery.

18 You also have a pole camera. J-Mark showed you who he  
19 thought could be Gucci, again, because of the clothes he was  
20 wearing. Don't forget about that.

21 And then don't forget about Ramone McDermott,  
22 testified just yesterday, about the day after the robbery, he,  
23 Gucci, came back, was talking to Gotti. And what he said, what  
24 he said there was that he was at the robbery, and he told  
25 Reckless not to shoot, but Reckless did anyway.

E8k9chr5

Summation - Mr. Bauer

1           Now the evidence doesn't really support that Reckless  
2 did the shooting. Let's be clear about that. But what's Gucci  
3 doing with that statement? He's trying to push the  
4 responsibility of the shooting off of him. But in the process  
5 he's putting himself right in there in that robbery. Ladies  
6 and gentlemen, beyond a reasonable doubt Glenn Thomas was  
7 involved in this robbery.

8           Much of that same evidence applies to Tyrell Whitaker,  
9 the video, that we just watched. Everything that Jamar Mallory  
10 told you about what happened applies to Tyrell Whitaker. The  
11 pole camera applies to Tyrell Whitaker because remember  
12 Mr. Mallory said that that could be -- that could be Bow Wow.  
13 And he had said when he was first interviewed by the police  
14 that it was based on his light skin. He didn't say it was  
15 definitely him. Just what it could have been.

16           Mallory had seen him with that robbery before -- I'm  
17 sorry -- with the robbery, with the gun before, that same  
18 silver revolver. He came by and borrowed it, or brought it  
19 back to Kev Gotti. That's the story that you just heard out of  
20 Kev Gotti's mouth too. That the gun didn't work. He said  
21 point it to your hand, shoot it out the window. That's a very  
22 specific story to hear from Mallory when you know you can  
23 believe him because Kev Gotti, not a cooperator, no cooperation  
24 agreement, told you.

25           Then there's Ramone McDermott. Ramone McDermott

E8k9chr5

Summation - Mr. Bauer

1 testified yesterday that after the robbery Bow Wow ran to the  
2 house at 260 First Street with blood on him. He had used the  
3 word "covered" in the past. Before you he was using the word  
4 "splatter" like if you threw water off the wall and it bounced  
5 back. He said it was here, the bottom part of his sweatshirt  
6 and his legs.

7 Now that's about where Baynes was stabbed, ladies and  
8 gentlemen, right there in the back, right here. It makes  
9 sense, ladies and gentlemen.

10 And McDermott, everything else he told you lined up  
11 with exactly what Mallory had told you and lined up with things  
12 that Gotti told you.

13 Now, there was one small inconsistency between  
14 McDermott and Mallory, and that was the brand of the sweatshirt  
15 that Bow Wow was wearing.

16 Now, they both told you black hoodie. Both. Little  
17 red writing here. One remembered Hollister. One remembered  
18 Champion. I ask you ladies and gentlemen, evaluate the  
19 consistency of that versus the small inconsistency of the brand  
20 three-and-a-half years later. It's pretty close, ladies and  
21 gentlemen. And McDermott said very clear, he had said time and  
22 again, it was a dark sweatshirt. He had said he never said  
23 blue. He had said black.

24 So rather than focusing on a small inconsistency,  
25 focus on how similar their stories are. And I think that small



E8k9chr5

Summation - Mr. Bauer

1 inconsistency, again, shows you how credible the witnesses are.  
2 If they were together in the GEO jail, as the questions were  
3 asked, and getting their stories straight, wouldn't they talk  
4 about what brand? But they didn't. And it shows you that  
5 they're just telling you like it is, how they remembered it  
6 three-and-a-half years later.

7 Now, before I move on or off of Tyrell Whitaker, since  
8 he's not charged with the drugs and the other guns, let me just  
9 talk for a moment and say that you heard that he was part of  
10 this crew selling drugs. You heard that he sold crack. You  
11 heard that he sold heroin. You saw the heroin in the brown  
12 rice, the Goya rice, that he was arrested with on August 12,  
13 2010. You heard that he sold drugs from Baynes, Mallory,  
14 McDermott, Williams.

15 Danielle Williams, in particular, told you about Bow  
16 Wow's drug sales. She saw him at 38 Dubois Street serving a  
17 customer because Reckless told him to. And she told you about  
18 how he sold drugs with other people like Bash in her house with  
19 her son, Smoke.

20 Ladies and gentlemen, beyond a reasonable doubt Tyrell  
21 Whitaker was part of this crew, part of this robbery. Part of  
22 the murder of Jeffrey Henry.

23 Two final points on the murder. First, as you know,  
24 the defendants are charged with murder. Now, some cases the  
25 government has to prove that the defendants intended to kill

E8k9chr5

Summation - Mr. Bauer

1 the victim to prove murder. Not here. As Judge Ramos will  
2 explain to you, what the government has to show is that the  
3 defendants intended on committing a robbery -- not a murder, a  
4 robbery -- and that during that robbery, during that felony  
5 somebody was killed. That's all. It's an important point and  
6 one that I think you need to keep in mind as you listen to all  
7 of the evidence here.

8 Now what about the big question? Who shot and killed  
9 Jeffrey Henry? Was it Bash, Bow Wow, Gucci, Akinto Boone?  
10 Ladies and gentlemen, I'm just going to dismiss that out of  
11 hand. Akinto Boone told you that the hallway curved. It would  
12 take a magic curving bullet for Akinto Boone to shoot around  
13 that hallway. You saw that door. It didn't have any bullets  
14 in it. And as you heard from every witness, the door was  
15 barely opened. Let's forget about that Akinto Boone, those  
16 questions. That's ridiculous.

17 Now, it's a distraction. But the question is --  
18 because if I were you, I would have been sitting here through  
19 this trial wondering who was the shooter? Which robber shot  
20 Mr. Henry? And the fact is we don't know.

21 You heard that Bow Wow, Gucci, and Bash were taking  
22 turns firing at Mr. Henry. But you heard no evidence as to  
23 which of the robbers fired those fatal shots.

24 But here's the bottomline. It doesn't matter. It  
25 doesn't matter. As I said earlier, each of the defendants is

E8k9chr5

Summation - Mr. Bauer

1 charged not only with committing the robbery and murder but  
2 also aiding and abetting those crimes as well. I expect that  
3 Judge Ramos' instruction will make clear to you that if you aid  
4 or abet the shooter, you are just as guilty as if you pulled  
5 the trigger.

6 What does aiding and abetting mean? I expect Judge  
7 Ramos to give you examples. But what does it include? Being  
8 part of the robbery crew. Having your own gun at the robbery.  
9 Pulling it out during the robbery. You don't have to be the  
10 shooter, ladies and gentlemen.

11 Let me be perfectly clear. Baynes and Quay Quay.  
12 They were lookouts. Didn't have guns. They are guilty of the  
13 robbery, of aiding and abetting the robbery and aiding and  
14 abetting the murder.

15 L-1, who wasn't even there but set it all up, guilty  
16 of aiding and abetting the robbery and the murder.

17 So these guys in the house with their own guns, guilty  
18 of either the murder or aiding and abetting the murder. There  
19 is no difference.

20 So all those points about how it was a 9-millimeter  
21 bullet that killed Mr. Henry. So what? It's interesting. It  
22 would be nice to know who shot that particular bullet. But it  
23 is legally irrelevant.

24 Bow Wow and Gucci were given revolvers by Mallory and  
25 Kev Gotti. They were not 9-millimeters. But you don't know

E8k9chr5

Summation - Mr. Bauer

1 what caliber gun Bash had. Maybe it was a 9. Maybe he's the  
2 one who shot Mr. Henry. Maybe the robbers traded guns before  
3 the robbery.

4 And even though Bow Wow and Gucci had the .38  
5 revolvers from Mallory and Gotti, maybe they swapped them with  
6 Bash and Baby E. We don't know. Anthony Baynes didn't know.  
7 Jamar Mallory didn't know. But it's besides the point.

8 As defense counsel speaks to you, and if they focus on  
9 this 9-millimeter defense, I suggest to you that it's a  
10 distraction. It's interesting, but it's a distraction. You  
11 need to focus on the evidence. And you need to focus on the  
12 law. And if you do that you'll see that the defendants are  
13 guilty of the charged murder.

14 Now before I move on to those other counts of the  
15 drugs and the guns I want to talk to you a little more about  
16 the cooperators. As you know, we called four witnesses,  
17 Baynes, Mallory, Danielle Williams, David Evans, who pled  
18 guilty to cooperation agreements. There were two other  
19 witnesses, Ramone McDermott and Akinto Boone who are hoping to  
20 get a letter from the government -- they didn't have an  
21 agreement -- who are hoping for a letter.

22 Ladies and gentlemen, it would be great if we could  
23 call fine, upstanding citizens here to the witness stand to  
24 talk about the interworkings of a robbery crew or crack sales  
25 on Chambers Street. But you know that's not possible. Can't

E8k9chr5

Summation - Mr. Bauer

1 be done. People who know about these things are the other  
2 criminals who did them with the defendants or who were selling  
3 crack inside 54 Chambers.

4 There is no question that these people committed  
5 terrible crimes. But it doesn't follow that simply because  
6 someone has committed crimes that they can't be telling you the  
7 truth about the crimes that they participated in or saw other  
8 people do.

9 Again, let me remind you the defendants did not have  
10 to put a case on. But they did. They did by questioning our  
11 witnesses and attacking their credibility. So, we're going to  
12 scrutinize some of those attacks.

13 Let's get this straight from the beginning. There is  
14 no question that the cooperators didn't testify out of the  
15 goodness of their hearts. Each of them has committed serious  
16 crimes. Each of them got caught by the government. And they  
17 are hoping for a break in their sentence. Absolutely.

18 The government didn't call these witnesses in the  
19 hopes that you'd like them. It's not a popularity contest  
20 though, ladies and gentlemen. The issue is not whether you  
21 like them. Jamar Mallory, for instance, did some stuff that's  
22 really unlikeable. While he was out on the street working for  
23 the government. He was playing both sides. He was snitching  
24 on people and then doing robberies with those same people.

25 It's hard to like someone like Danielle Williams who

E8k9chr5

Summation - Mr. Bauer

1 testified about setting up a robbery where a gun was put at her  
2 sister's head and her ten-year-old niece's head.

3 Danielle Williams also participated in a murder, as  
4 did David Evans. But you know who else did that? You know who  
5 else participated in a murder as well as commit other crimes?  
6 These guys. These three defendants. But unlike the  
7 defendants, Danielle Williams, Baynes, Mallory, Evans, they all  
8 came in here and let it all hang out for you. Unlike these  
9 defendants, they accepted responsibility for what they did.  
10 They told you everything they knew and they told you everything  
11 they did. Even the worst things.

12 You've got to remember this, ladies and gentlemen.  
13 Defense counsel want it both ways. When it comes to their  
14 clients, they scream outrage. These snitches must be lying.  
15 But what about the other side they talked about? What about  
16 Baynes admitting his involvement in the robbery and the murder?  
17 Or that of Quay Quay's? Oh, for that, you can believe them.  
18 You can believe them about the stuff they did. Or you can  
19 believe them about the stuff that other people were involved  
20 in. But when their clients get involved: Oh, no, no, they  
21 must be lying.

22 That's not right, ladies and gentlemen. They can't  
23 have it both ways.

24 Defense counsel has also sprinkled this examination of  
25 witnesses, the idea of mixing truth and lies, implying that

E8k9chr5

Summation - Mr. Bauer

1 that's what the cooperators are doing or that's what they did  
2 in the past. Again, it's the same problem, ladies and  
3 gentlemen. Defense counsel are picking and choosing what the  
4 truth is to satisfy their own arguments, the truth about the  
5 cooperators lying about their clients. Simply makes no sense,  
6 ladies and gentlemen. The question is whether they told you  
7 the truth.

8 Let's talk about their demeanor on the witness stand.  
9 Each of them got up there and they told you about every crime  
10 they committed, crimes they were convicted of, and crimes that  
11 they were never caught doing. The government never would have  
12 known about if they hadn't admitted them. Like the robberies  
13 that Baynes told you about or Mallory told you about. Think  
14 about how hard this was for some of them on the witness stand.

15 Think back to Jamar Mallory who said that he hated  
16 cooperating against his good friend, Kev Gotti. And then think  
17 about his demeanor on the witness stand. He didn't remember  
18 certain things. Small things. He didn't remember things when  
19 I asked him. He didn't remember things when defense counsel  
20 asked him. He was steady. He was consistent. Just answering  
21 the questions to the best that he remembered.

22 How about Baynes? How about that mumbling? It's been  
23 a long time ago. But remember how hard it was to understand  
24 him. It's painful. But then also think about how he carried  
25 himself. Did his voice change from direct to

E8k9chr5

Summation - Mr. Bauer

1 cross-examination? Did his posture change? Or did he just  
2 steadily answer the questions? Owning up to his lies.  
3 Explaining why he had lied. And then explaining why he was  
4 telling the truth now.

5 Same for Evans, for Williams, for McDermott.

6 No one is saying that these cooperators were the  
7 smartest people in the world. They most certainly are not.  
8 But, again, it's not about their brains. It's about whether  
9 they told the truth.

10 I suggested earlier to ask you -- for you to ask  
11 yourselves, as you ran through the proof in this case, whether  
12 it was some big conspiracy, a big setup by each of these  
13 witnesses to get these defendants convicted. Ask if there was  
14 a big plan for these cooperators to get together in all these  
15 different jails, to get ahold of all the other evidence, the  
16 other witnesses who are out on the street to make sure that  
17 their stories line up. Think about that. That would be  
18 really -- that would be really hard. Like something out of the  
19 movies.

20 Now think about Anthony Baynes. Think about Jamar  
21 Mallory, Akinto Boone, Ramone McDermott. Think about their  
22 demeanors.

23 Those guys. Could it possibly be that those guys who  
24 could barely answer some of the questions that were asked of  
25 them, could barely understand what some of the questions were,



E8k9chr5

Summation - Mr. Bauer

1 they're capable of that?

2 Of course not. Just to say it out loud sounds  
3 ridiculous, ladies and gentlemen. The safer thing, the easier  
4 thing, the only thing for them to do was to tell the truth,  
5 which is exactly what they did.

6 Now, ladies and gentlemen, again let me just reiterate  
7 for you that the burden is with us. It's not with defense  
8 counsel. It never shifts even if they attack our witnesses.  
9 We are analyzing some of the arguments and some of the  
10 questions that were asked, but that does not shift the burden  
11 from here to there. It's still here. Those defendants are  
12 still presumed innocent until you go in there and deliberate.  
13 Just want to make that clear.

14 Now getting back to the cooperators generally, besides  
15 thinking about their demeanor, think about their motivation and  
16 their incentive to lie to you. Or to tell the truth. If they  
17 cooperate and tell the truth, then they get a letter to the  
18 judge and the power to get a lower sentence. But if they lie,  
19 their agreement gets ripped up and they are looking at  
20 mandatory sentencing of 17, 80, life.

21 Here is the kicker, and don't let this go unnoticed.  
22 They get the letter whether or not these defendants are  
23 convicted. As long as they fulfill the obligations of their  
24 agreement, as long as they tell the truth on the witness stand,  
25 they get the letter. So ask yourselves -- many of them had

E8k9chr5

Summation - Mr. Bauer

1 screwed up before. But now as they sit here today, after they  
2 screwed up and after they got caught. And someone like Jamar  
3 Mallory, his agreement, he didn't even know if he was going to  
4 get that 5K letter. Ask yourself what his incentive was. The  
5 downside consequence is so high, facing that mandatory minimum,  
6 should he lie or should he tell the truth and try to get that  
7 letter from the government. They don't need to sink these  
8 defendants to get a break. They need only to tell the truth.

9 Now Baynes and Mallory were exposed as being bad liars  
10 when they first talked to the government. Some of their lies  
11 made no sense. That's why Baynes kept changing his story in  
12 the hospital. Saying he wasn't in the house. Then saying he  
13 was. Then saying he was checking on Reckless. He's a bad  
14 liar.

15 Ladies and gentlemen, it's hard to remember your lies,  
16 especially when they are bad and they crumble all around you,  
17 especially for somebody like Anthony Baynes.

18 But you know what's a lot easier to do? To remember  
19 the truth. When you get rid of the lies, there's nothing left  
20 to keep straight. All you got to do is tell the truth.

21 Now think about what the cooperators said and didn't  
22 say. Did they blame everything on the defendants? Somehow try  
23 to frame them all? Did they minimize their own conduct? Did  
24 they testify as if they knew everything about this case?

25 Absolutely not. There are so many of those examples.

E8k9chr5

Summation - Mr. Bauer

1 Danielle Williams arranging a robbery of her sister. The  
2 defendants didn't do that. Mallory shooting Kev Gotti in the  
3 foot. Defendants didn't do that. Baynes committing six or ten  
4 robberies. Not the defendants. McDermott's robbery. Not the  
5 defendants.

6 These witnesses didn't exaggerate or make things up to  
7 frame the defendants. They didn't say that Reckless, Bow Wow,  
8 Gucci did those things. It wouldn't have been true and they  
9 didn't say it.

10 And if they were so intent on lying, why not make  
11 better lies? Mallory didn't profess to know everything that  
12 happened during the robbery. He only knew what the defendants  
13 told him, which was not everything.

14 McDermott didn't tell you that Bow Wow marched into  
15 260 First Street with the blood all over his clothes and give  
16 him a full confession. He just said he asked for a bag. If he  
17 told you more, he would have been lying. Ask yourselves why,  
18 if they were lying, they wouldn't give you more.

19 Baynes didn't even profess to be part of the whole  
20 story. Remember he told you that Bash wouldn't let him go in  
21 that house. If he wanted to be the person who knew everything,  
22 and he wanted to lie about it, he would have put himself in  
23 that house. But he didn't because it wasn't true.

24 Now, on a related note, think about the level of  
25 detail that they went into, in talking about their crimes.

E8k9chr5

Summation - Mr. Bauer

1 They told you minute details about what they did and what the  
2 defendants did. Not because they were necessarily important,  
3 but because that's how they remembered them. Like the brand of  
4 sweatshirt that Bow Wow was wearing, or the scarf that Gucci  
5 was wearing, like the beers in that Gucci brought over to  
6 Mallory's when he playing with the gun as they talked, and like  
7 that Bash was wearing white gloves the night of the robbery.  
8 That's what small detail. But Baynes remembered it so he told  
9 you about it.

10 Now, let's look at what we found at the crime scene,  
11 ladies and gentlemen, Government Exhibit 94H. That's a white  
12 glove on the ground. Exhibit No. 8. And it was in the  
13 hallway.

14 And now here are the still shots of the people -- of  
15 the person Baynes identified as Bash at the top. This is  
16 walking down. Let's zoom in. What are on his hands, ladies  
17 and gentlemen? White gloves. At the bottom, on the far left,  
18 that is Bash running back. I don't see any white gloves there,  
19 ladies and gentlemen. It's a small detail that Baynes gave you  
20 but the video corroborates what he said.

21 Which brings me to the ultimate point that I've said  
22 again and again. Corroboration. How what the cooperators said  
23 was consistent with and corroborated by the rest of the  
24 evidence in this case. Again and again different witnesses'  
25 accounts of the same events consistent with each other and with

E8k9chr5

Summation - Mr. Bauer

1 the other evidence in the case. Not a hundred percent. Not  
2 all the time. But pretty darn close.

3 We already went through the murder, how the witnesses  
4 corroborated each other. And corroborated by the other  
5 evidence. I won't do it again. I'll just remind you how  
6 powerful, how strong that wall of bricks is because the  
7 evidence supports itself.

8 On this point, let me say one final thing. Baynes and  
9 Mallory both told you that Reckless was present at that  
10 robbery. 54 Chambers that night. They did so credibly. And  
11 you can rely on them to convict Christian alone.

12 But there was more. There was a mask. There was the  
13 DNA on the mask. It corroborates what they said, that Reckless  
14 was part of that robbery. So what that means is it shows you  
15 how credible the cooperators are. Don't forget that.

16 When Baynes and Mallory tell you that Reckless was  
17 there. And then the DNA with a one-in-three-hundred-billion  
18 certainty shows you that Reckless was there, it supports that  
19 they're credible; that they told you the truth. And you can  
20 use that evaluation of their credibility for all the other  
21 evidence and everything else they told you in the case, even  
22 beyond Reckless' participation. Keep that in mind, ladies and  
23 gentlemen.

24 Okay. I want to move briefly to Counts Three and Six.  
25 It's the drugs and it's the guns. I spent most of my time

E8k9chr5

Summation - Mr. Bauer

1 talking about the murder, and rightfully so. Now let's talk to  
2 how we know that Raymond Christian and Glenn Thomas conspired  
3 to sell drugs and in furtherance of that conspiracy carried  
4 guns.

5 Remember, again, Tyrell Whitaker is not charged in  
6 these counts.

7 Now let me be clear up front about Reckless and Gucci  
8 as drug dealers. They were not drug kingpins, and the evidence  
9 didn't bear that out. These guys sold street-level amounts of  
10 crack. You hurt from cooperators like Mallory and Evans who  
11 sold much more than that. The evidence was clear on that. But  
12 nevertheless Raymond Christian and Glenn Thomas sold crack.  
13 They sold crack side by side, in concert with others in  
14 Newburgh. And for that they are guilty of the drug charge.

15 Now very little of what needs to be proven for these  
16 counts is in dispute. In their opening Raymond Christian's  
17 lawyers admitted to you that Christian sold drugs. And he  
18 didn't have to make an opening statement, but he did. So let's  
19 look at what he said. Mr. Strazza said he is no angel. He has  
20 possessed guns in the past. He has sold drugs in the past. He  
21 was part of a group that was called Star Status on the street.  
22 So you know that the drug dealing of Raymond Christian actually  
23 happened.

24 And, again, bring you back to Facebook. Getting money  
25 on Dubois. We know what that means. Raymond Christian telling

E8k9chr5

Summation - Mr. Bauer

1 you he sells crack on Dubois.

2 And how about this photograph of Raymond Christian on  
3 Facebook. All that money fanned out on his thigh.

4 He didn't have any legitimate jobs, ladies and  
5 gentlemen. He made money in one of two ways. That's what you  
6 heard from the cooperators. Robberies and guns.

7 What else is not in dispute? Raymond Christian and  
8 Glenn Thomas were carrying guns back in 2010 and 2011. For  
9 Christian, speaking about the Facebook -- remember his  
10 postings. Remember his postings "From the .22 to the  
11 9-millimeter. Love those gun sounds." I already told you that  
12 he substituted the lyrics out to match his guns.

13 But how else do you know that Reckless and Gucci were  
14 carrying guns back then? Because Christian was arrested twice  
15 in 2010. Thomas once in 2011. All three arrests with guns.  
16 And they both pled guilty to possessing guns.

17 I think I'm out of order. I'm giving you guys a free  
18 preview. I didn't mean to. I'm out of order.

19 Christian admitted to possessing that gun on  
20 October 7, 2010. The one where he was chased by the cops in  
21 back of L-1's house. Remember he spoke to Detective Goodman.  
22 Remember he said it was a -- the .22 -- I'm sorry. It was a  
23 .380 Kel Tec. I'm sorry. It was a 380 Kel Tec. And remember  
24 what he said. He kept one in the head and seven in the clip.

25 And remember what he said. Why do you have this

E8k9chr5

Summation - Mr. Bauer

1 handgun on your person? I was protecting myself. I'll get to  
2 that in a moment.

3 But then what did he do after he made this statement?  
4 He walked into a courtroom just like this, took an oath just  
5 like all the witnesses have before you, and he admitted to  
6 possessing a gun.

7 Glenn Thomas did the same thing after he was arrested  
8 February 28, 2011. Reckless with this gun.

9 MR. BUCHWALD: Your Honor, objection. This is simply  
10 propensity. We'll have motions later.

11 THE COURT: Overruled.

12 MR. BAUER: Reckless with this gun. Gucci with this  
13 gun, ladies and gentlemen.

14 The guns of the defendants. This one is Reckless.  
15 This one is Gucci.

16 So what's left -- I'm sorry. Just one quick thing on  
17 the law here. You heard some evidence that Gucci's gun was  
18 inoperable. As Judge Ramos will explain to you, doesn't  
19 matter. It might have mattered in the state. It does not  
20 matter here. Distraction.

21 Okay. So what is left in dispute? How do you know  
22 that these guys conspired to sell crack?

23 I expect that Judge Ramos will tell you that to be  
24 part of a conspiracy that you don't need to know what every  
25 other coconspirator is doing or even who every other



E8k9chr5

Summation - Mr. Bauer

1 coconspirator is to be part of that conspiracy.

2 Now, Mallory and Evans, they explained to you how  
3 people sold crack in Newburgh. You heard that the defendants  
4 and the other Bloods and the affiliates were out on the streets  
5 of Newburgh at all hours hustling, selling crack. They do it  
6 at the same time.

7 Now, to be clear, a drug conspiracy does not need to  
8 be run like a Fortune 500 company. All that's required is that  
9 the conspirators help each other sell drugs in some way. That  
10 way could be big like selling on a team regularly sharing  
11 profits. They could be small like letting others bag up in  
12 your apartment, or letting someone serve your customer; or it  
13 could be huge by doing something really bag like joining  
14 together to do an armed robbery of a crack spot on Chambers  
15 Street on December 15. You heard about all of these types of  
16 things that the defendants did.

17 Now let's hone in on what the conspiracy is, ladies  
18 and gentlemen. Because a lot of people were selling crack in  
19 Newburgh. There were a lot of different people maybe doing  
20 their own conspiracies. What we are talking about is the  
21 robbery crew, the extent of the robbery crew; include L-1,  
22 Gotti, Reckless, Gucci -- even Bow Wow, even though he's not  
23 charged with it -- J-Mark, Bash. They are all connected,  
24 ladies and gentlemen. Mallory and L-1 were business partners.  
25 You heard that. They sold out of the same house. They served

E8k9chr5

Summation - Mr. Bauer

1 each others customers. One with crack, one with heroin. Then  
2 you heard that Mallory there gave drugs to Gucci and then sent  
3 him for customers. Gucci -- you heard Gucci -- so Mallory  
4 giving drugs to Gucci. Gucci is under L-1. L-1 was also  
5 supplying Bow Wow. L-1 also gave customers to Reckless.  
6 Reckless gave customers to Bow Wow. Bow Wow and Bash sold  
7 together out of Danielle Williams' house. Bow Wow and Gotti  
8 sold together. Gotti and J-Mark sold crack together out of 260  
9 First. Mallory and Reckless got crack together from the same  
10 supplier. Whole host of ways, ladies and gentlemen, of how  
11 these individuals worked together.

12 From Mallory you heard that people who sell crack  
13 together, like Mallory, using the same apartment, like 260  
14 First Street, to bag up their crack, to store their crack. Not  
15 just like 260 First but also the houses that he shared with  
16 L-1. Remember there was a crack customer -- actually I think  
17 it was a heroin customer named Sissy. They were at her house.  
18 And then Geneva's house, L-1's girl.

19 They also shared sales. Remember Mallory was telling  
20 you about splits. A customer comes, wants a hundred dollars  
21 worth of crack. Mallory gives 50. The other person gives 50.  
22 They split it. They do that for one of two reasons: So they  
23 both can profit, as Evans says respect, that's something they  
24 do respect for the boys. But you also do it if you don't have  
25 the full hundred dollars worth of crack. You don't want to

E8k9chr5

Summation - Mr. Bauer

1 disappoint your customer so you go to your buddy and say let me  
2 get that crack so that customer will come back.

3 They gave each other drugs. You heard, ladies and  
4 gentlemen, that Jamar Mallory gave Gucci drugs. They would go  
5 to common suppliers together, just like Mallory and Reckless  
6 did. They worked together to avoid law enforcement. As  
7 Mallory told you, when they were on the street, cops were there  
8 all the time -- you heard from the cops, they were there all  
9 the time -- they came by, they would say "boys," they would say  
10 "one time." And then everybody would scatter.

11 They would also hide their drugs in various places.  
12 Not on their person. Don't need to go into what Mallory told  
13 you, but he gave you some explicit detail about how he made  
14 sure to not have drugs on him when the cops came.

15 They also talked about how they shared guns. And you  
16 heard why, ladies and gentlemen. They used them for two  
17 reasons, to do a robbery or shooting; but also cooperators told  
18 you that it was to protect themselves and their product while  
19 they were selling drugs, in case someone came and gave them  
20 trouble, in case someone came to rob them. And they stashed  
21 them in hidden but easily accessible places in case they needed  
22 them.

23 They also told you about their turf. It wasn't --  
24 there weren't any specific rules about who could sell and who  
25 could not sell in the northeast part of the city. But as Evans

E8k9chr5

Summation - Mr. Bauer

1 told you yesterday, you've got to be a Blood or affiliated with  
2 the Bloods or 550 in order to sell there. You can't just --  
3 not just anybody can show up in that part of the city and sell.

4 Now, ladies and gentlemen, the cooperators told you  
5 about all the times that they saw Reckless and Gucci with  
6 crack. They also told you about the other people, Kev Gotti,  
7 Freaky, Geo, Quick, Snelly, all these other names, about how  
8 they sold crack.

9 Now, I'm not going to go through every time that they  
10 saw each one of these sell crack. But I'll say -- I'll just  
11 remind you that Mallory said that he saw Gucci sell crack five  
12 or six times. He would give him the crack -- not that much but  
13 he would give him the crack. And they would be on the street,  
14 like on Lutheran or William. And when they'd be out there,  
15 Gucci would have the crack, he would say: J-Mark can I serve  
16 your customer? J-Mark would say yes.

17 Fuzzy said he saw Gucci with J-Mark on Lutheran. Same  
18 thing that J-Mark said. He saw him sell a couple times.

19 Fuzzy said he saw Reckless sell on Dubois 2009 or  
20 2010.

21 Danielle Williams said she saw Reckless selling out  
22 there even at 38 Dubois. Remember, she said that L-1 gave  
23 Reckless a sale at 38 Dubois. That was 2010.

24 She saw Reckless do the same thing for Bow Wow. Same  
25 place.

E8k9chr5

Summation - Mr. Bauer

1           And then she saw L-1, Reckless, Bow Wow, Gucci,  
2 Baynes, all together at that same house.

3           Mallory. Mallory told you that he and Reckless went  
4 to a supplier named Wil. They both got seven grams. And then  
5 he saw Reckless selling on the same streets. While J-Mark was  
6 selling, Reckless was selling. City Terrace, Lutheran, Dubois.

7           And then there's Baynes. Baynes saw Reckless sell.  
8 He would sell for months at time. Take some months off and  
9 then go back to selling. On Dubois. On Broadway. On Lander.  
10 He saw him during those months alongside guys like L-1, Bow  
11 Wow, Freaky. And just remember the detail, that Bow Wow said  
12 he saw that jar of crack with the rice in Reckless's apartment  
13 storing -- stored in the rice to keep it fresh.

14           Without exaggeration, ladies and gentlemen, that's  
15 cooperator after cooperator telling you the same thing about  
16 Reckless and Gucci about how they sold drugs. Not a lot, but  
17 they sold drugs.

18           Speaking of this conspiracy. Here's the real kicker  
19 about how you know these defendants are guilty of the drug  
20 conspiracy. Because on December 15, 2010 they conspired to  
21 obtain crack cocaine so they could resell it. And they  
22 conspired to get money so they could go buy more crack and  
23 resell it. What I mean, of course, is the robbery at 54  
24 Chambers Street. So which is why, when you're considering  
25 Counts Three and Six you should consider that robbery too.

E8k9chr5

Summation - Mr. Bauer

1 Raymond Christian, Glenn Thomas, five other people, they  
2 conspired together that day to sell crack cocaine. And that  
3 alone, alone, that act would make them guilty of Count Three.  
4 But, of course, we know that they were doing more than that.  
5 You heard evidence after evidence showing that they were  
6 selling crack on the streets.

7 Now, very quickly, my last piece before I sit down, is  
8 the guns. They are also guilty of the firearm charge. The  
9 charge is that they possessed guns during and in relation to  
10 their drug sales.

11 Now, you heard from all the cooperators that you  
12 possessed guns to either rob people or to protect yourself  
13 while you're committing crimes. What crimes were the  
14 defendants committing? Selling drugs.

15 Now, what did we hear about Gucci with the guns?  
16 Again, I can't -- I'm not going to go through every single  
17 thing that the cooperators said. But remember Mallory says he  
18 saw Gucci with three guns. An antique gun. He saw him with  
19 the .22 that he got arrested with. And he saw him with a .357.

20 McDermott saw Gucci with a gun, that same gun he was  
21 arrested with, February 2011. 260 First Street. The same  
22 place Mallory saw him with it.

23 And Danielle Williams saw Gucci not with a gun but  
24 around a gun. Remember that story. It was the incident  
25 involving her son Smoke. There was a beef with Reckless.

E8k9chr5

Summation - Mr. Bauer

1 Reckless came to the meeting where he demanded that she pay  
2 four hundred dollars in order for him to leave her son alone.  
3 And he brought a gun to that meeting. She said: You're going  
4 to bring a gun to a meeting with a female? And what did  
5 Reckless do? He was with two guys and he handed the gun off.  
6 I think he said to the other guy, but there was Gucci right  
7 there. Three cooperators. Gucci with guns or around guns.

8 So besides that story with Smoke, what did you hear  
9 about Reckless? Again, you saw the Facebook. You saw the gun  
10 he was arrested with -- the guns -- the guns that he was  
11 arrested with.

12 But you heard Danielle Williams saw him with a gun on  
13 Lutheran in 2010 on another occasion. Evans saw him with a gun  
14 on Lander Street in 2010. Mallory saw him with a gun twice.  
15 In early 2010, including a .380. He was showing it around.  
16 And then after a party on South Miller when he shot it in the  
17 air. That story matches up with what Baynes told you. Baynes  
18 saw Reckless with guns every couple of days back in '09 and  
19 2010. He saw him with a long .22, a small black .380 and a big  
20 .45. Guns he stored at Freaky's house because Reckless and  
21 Freaky, they sold crack together. And they shared guns  
22 together. Why? For protection, of course, to protect  
23 themselves and their drugs. And Baynes told you about times  
24 Reckless shotguns, like the story at a party -- actually there  
25 were two stories where he shot guns at party and after one of

E8k9chr5

Summation - Mr. Bauer

1 those shootings he got caught with a gun. You know that's true  
2 because we got the gun. Reckless also talked about how he shot  
3 Little Homey, how he shot him seven times back in 2010.

4 Ladies and gentlemen, again, you have cooperator after  
5 cooperator talking about how they guys carry guns, how they  
6 sold drugs, and during the same time period carried guns.

7 How do you know the guns were related to the drugs?  
8 Sure would be nice if the police had found the defendants'  
9 drugs and guns together. That would put it to rest for sure.  
10 Kind of as they did for L-1. But no matter, you just need to  
11 look at what Reckless's words said. And then use your common  
12 sense.

13 Here he is -- here he is, Reckless. He's saying,  
14 "From the .22 to the 9, love those gun sounds." And what else  
15 is he saying, "I get money and it don't cost a thing to get  
16 popped."

17 "I get money." That means selling drugs. To "get  
18 popped" that means shooting. The guns and the drugs are  
19 connected, ladies and gentlemen.

20 Use your common sense. As the cooperators told you,  
21 it's precisely why members of the Bloods, members of Star  
22 Status, members of this robbery crew kept guns on other  
23 occasions: To protect themselves while they were committing  
24 their crimes. And that includes Reckless and Gucci.

25 The evidence is plentiful that they carried guns.



E8k9chr5

Summation - Mr. Bauer

1           And the evidence is plentiful that those guns were in  
2 connection with their criminal lives which included selling  
3 drugs.

4           I'm now done going through the evidence. But before I  
5 sit down I want to leave you with two thoughts.

6           (Continued on next page)

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

E8KZCHR6

Summation - Mr. Bauer

1 MR. BAUER: First, don't go numb, and second, use your  
2 common sense. By don't go numb, what I mean is that you've  
3 heard a lot of terrible things, a lot of shooting and a lot of  
4 violence. And, frankly, as you sat here throughout the trial  
5 you could have become numb to it. It's really a serious  
6 violence involving a lot of people. I want you to stop and  
7 think about what it represents, what actually happened. When  
8 these robbers each pick up a gun and made the decision to point  
9 it at these victims, what happened, decided the only way to get  
10 Jeffrey Henry out of the way of that door was to fire their gun  
11 at him, what happened? Jeffrey Henry was, is a real person,  
12 ladies and gentlemen. The guns were real, the bullets that  
13 came out of those real guns, real bullets. Those screams you  
14 heard, these are very very real screams. Let's not lose sight  
15 of how truly horrific and significant this robbery was that  
16 caused the end of someone's life. It's easy to forget that  
17 when you do what we do for a living or what you guys have had  
18 to do for the last three weeks; hear evidence about senseless  
19 violence. But remember each story of these defendants with  
20 guns tell a tale about a life in Newburgh that carried deathly  
21 consequences.

22 Taken together, all of these incidents tell a tale of  
23 a life lived by these three defendants, a life of selling  
24 drugs, carrying guns and robbing people, robbing people that  
25 led to the death of another person, Jeffrey Henry.

E8KZCHR6

Summation - Mr. Bauer

1           So don't go cold, ladies and gentlemen. These things  
2 really happened. 54 Chambers Street was really robbed, robbed  
3 by people with guns. Jeffrey Henry was really killed. Guns  
4 were really carried all around Newburgh. Remember that. And  
5 remember it was these three guys who did it.

6           Second, remember what Mr. Nawaday asked you at the  
7 start of this trial, use your common sense. As you are about  
8 to hear from defense, I urge you to again use your common  
9 sense. Keep in mind the difference between evidence on the one  
10 hand, and argument and speculation on the other. And when you  
11 go back into that room to deliberate, at that time most  
12 especially, I ask you to use your common sense, your common  
13 sense about what people's words really mean, about what  
14 people's action really mean, and your common sense about how  
15 things really work in the world. If you do that, if you use  
16 your common sense when you deliberate, then I'm confident that  
17 you will return the only verdict that is consistent with the  
18 evidence and consistent with the truth, these three men are  
19 guilty as charged; that these three men are guilty of the  
20 murder of Jeffrey Henry and all of the other charges that they  
21 were brought against them in the indictment.

22           Thank you, your Honor.

23           THE COURT: Thank you, Mr. Baer.

24           Ladies and gentlemen, before we have our first defense  
25 closing, let's take a break. Let's take a 20 minute break.

E8KZCHR6

1 It's about 20, 30, 35 after, so please be in the jury room no  
2 later than five minutes prior to the hour, 2:55 p.m. okay.

3 (In open court; jury not present)

4 THE COURT: So counsel is aware, we received a phone  
5 call from -- people can be seated -- from the jury department.  
6 We received a call from the wife of one of the jurors that she  
7 has fallen and is being taken to the hospital. So he's just  
8 being informed now, and I ask that he be allowed to call her to  
9 see what the situation is. And depending on what he tells  
10 us -- obviously, if he has to leave, my inclination would be to  
11 relieve him and replace him with one of the alternate jurors.  
12 Okay.

13 MR. BAUER: Sure.

14 MR. GREENFIELD: You know which juror it is, Judge?

15 THE COURT: I do.

16 MR. GREENFIELD: Could we know?

17 MR. BUCHWALD: Your Honor, could I proceed with  
18 motions if --

19 THE COURT: Okay, sure.

20 MR. DRATEL: First I think each of the defendants  
21 wants to make the motion at the end of the case.

22 THE COURT: Okay.

23 MR. BUCHWALD: If I can move. Rule 29, I have  
24 specific motions directed toward the summation and a mistrial  
25 if I can address that at this point.

E8KZCHR6

1 THE COURT: Okay.

2 MR. GOLTZER: Do you mind if I go first? I have to  
3 run out. Forgive me.

4 I renew the Rule 29 motion based upon the same  
5 records. With respect to the Government's summation, the  
6 parade of errors oars that we anticipated would happen in terms  
7 of guilt by association, gang membership, propensity evidence  
8 and the like came true. I think that the Government's  
9 summation used that limited evidence far beyond its intended  
10 and proffered purpose. It was unduly prejudicial violating  
11 Mr. Whitaker's right to a fair trial within the meaning of the  
12 due process clause of the Fifth Amendment. I respectfully move  
13 for mistrial.

14 THE COURT: Application is denied.

15 MR. GOLTZER: May I be excused?

16 THE COURT: You may.

17 Mr. Buchwald.

18 MR. BUCHWALD: We renew our overall evidence, our  
19 overall motion at the end of the case. We believe all of the,  
20 with respect to each of the counts, reasonable jurors could not  
21 conclude beyond a reasonable doubt that the defendant Thomas is  
22 guilty, and so we renew our motion at the end based on the  
23 totality of the record.

24 With respect to the summation, my brother, Mr. Bauer,  
25 kept referring to the gun conviction before your Honor. The

E8KZCHR6

1 undisputed record is that that had -- well, first of all there  
2 is no indication whatsoever that that gun had any relationship  
3 to drugs. There is no indication that that gun had any  
4 relationship to robberies. As a matter of fact, Mr. Mallory  
5 himself testified that they were not -- that they were not  
6 connected with the robbery that gave the basis of the probable  
7 cause for the stop of Mr. Thomas, that there had been a robbery  
8 down the street involving a prostitute, and that there was no  
9 involvement with that.

10 What was being done is simply an argument that he had  
11 a gun in 2011 and that that somehow is proof. And the only way  
12 that that can be interpreted is as propensity evidence.

13 We move for mistrial on that basis and on the basis  
14 that Mr. Goltzer outlined.

15 We would also ask for a specific instruction to the  
16 jury that they may not consider his possession of that gun,  
17 Mr. Thomas' possession of that gun, as evidence of, in any way,  
18 shape or form of guilt with respect to counts three or six or  
19 indeed any of the counts against him.

20 THE COURT: Okay.

21 Mr. Bauer, do you -- well, just to address that  
22 specific point on the --

23 MR. BAUER: I don't know if you required a response.  
24 Judge, first of all, you already ruled on the admissibility of  
25 the evidence of that gun arrest. The elements of 924(c) is

E8KZCHR6

1 possessing a gun during the conspiracy. So of course it's  
2 probative to the charge to the gun charge.

3 Also, there was evidence, I have discussed it, and it  
4 came out during trial that why do people have guns? They have  
5 guns to protect themselves while they're either doing robberies  
6 or selling drugs. It did occur to me, and I thank Mr. Buchwald  
7 for reminding us so Mr. Nawaday can put it in his rebuttal,  
8 that one other piece of evidence that was that when, when Jamar  
9 Mallory gave Gucci drugs, he had the gun with him, so there is  
10 a direct correlation. I think I might have skipped over that  
11 when I was trying to speed up my end there, but Mr. Nawaday  
12 will be sure to hit that. But for a variety of reasons we  
13 oppose everything he's saying.

14 THE COURT: I'm sorry, Mr. Dratel did you wish to  
15 reply?

16 MR. DRATEL: Well, I think that couple things. One is  
17 that I think with respect to counts one and two, I think the  
18 jury needs to be instructed, based on the Government's  
19 summation, the jury needs to be instructed that that gun, 22,  
20 cannot be -- because the government had not made an allegation  
21 that gun is involved, the gun Mr. Thomas was found with in  
22 2011, that they cannot use that for counts one and two or four,  
23 because it cannot be relation to that.

24 With respect to count six, I agree with everything Mr.  
25 Buchwald said. But in addition I think what the government,

E8KZCHR6

1 what Mr. Bauer did and, you know, you hear it once and he's got  
2 a visual of it at the same time, so -- but my recollection is,  
3 and I don't know precisely what the language is -- my  
4 recollection is that Mr. Bauer at one point said that the gun  
5 possession, in the context of the robberies, could be used, and  
6 that the robberies were a basis for the drug count and for  
7 count six. He had them all up at the same time. It cannot be  
8 the basis for count six. Count six has to be in relation to a  
9 narcotics crime, not a robbery. And I think that has to be  
10 made clear to the jury, the Court's instructions are including  
11 the abstract in the context of this particular summation. I  
12 think they have to be made more clear as to what the limits  
13 are. And also that the, that even the -- and that the mere  
14 possession of that 22 is not sufficient, on February 28, 2011  
15 is not sufficient for any count, for any weapons count.  
16 Because the Court's instructions made clear -- but again I  
17 think this because of the summation has to be more clear, but  
18 that there is simply having a gun in the course of a drug  
19 transaction is not sufficient. It has to be used in some way.  
20 The case law is pretty clear on, that I think it is crystal  
21 clear on that. So I think that in light of the summation I  
22 think we have to have it brought to the jury's attention in a  
23 way that eliminates the possibility that they're influenced by  
24 that in a way that is contrary to what the law is.

25 THE COURT: Mr. Bauer?



E8KZCHR6

1 MR. DRATEL: Judge, I think your instructions are  
2 pretty clear that possession of a gun simply alone does not  
3 satisfy the elements of 924(c). It's during and in relation  
4 to, and your instruction are very clear, this is just one part  
5 of it. Mr. Dratel is right. Possession of that gun alone does  
6 not make him guilty of the crime. It's the other evidence that  
7 makes him guilty of the crime in concert with that.

8 To the extent that Mr. Dratel or Mr. Buchwald are  
9 asking that you clarify for the jury that it can't be the same  
10 gun for the 924(c) charges, I believe that's legally accurate.  
11 I don't -- I was not fully paying attention to the jury charge,  
12 focusing my closing. So I don't remember. But to the extent  
13 it's not in there, I think that is legally appropriate. So  
14 perhaps we can look at that. I think everything else, though,  
15 they're saying is, it's argument. And with regard to the  
16 instructions your instructions are adequate.

17 THE COURT: Well, why don't you take a look at the  
18 instructions here, Mr. Nawaday and tell me whether you believe  
19 that a further amendment is appropriate.

20 MR. BAUER: Okay. To be clear, the only thing that I  
21 think is even necessary to look at is whether you're clear that  
22 it needs to be a different gun for counts five and six.

23 THE COURT: Okay. And we're also expecting a further  
24 instruction from you concerning the type of narcotics.

25 MR. BAUER: Yes.

E8KZCHR6

1 THE COURT: Mr. Strazza.

2 MR. STRAZZA: I just wanted to make a record that on  
3 behalf of Mr. Christian we are also renewing our Rule 29  
4 application at this time based upon the record, and we join in  
5 co-counsel's arguments with respect to the motion for a  
6 mistrial.

7 THE COURT: Okay. Again I believe I denied the motion  
8 for mistrial. The Rule 29 motions are also denied for the  
9 reasons stated prior.

10 Okay, so we have about 12 minutes. Don't be late.

11 MR. BAUER: Till when, 2:55?

12 THE COURT: 55.

13 (Recess)

14 (Continued on next page)

E8knchr7

1 THE COURT: The juror has communicated with his wife.  
2 She is not in the hospital, but they do have a newborn. I  
3 still don't know what he wants to do, but she is home with the  
4 baby.

5 MR. GOLTZER: Whatever you think.

6 THE COURT: I am going to leave it up to him.  
7 We are going to release him if he wants to go and be  
8 with his wife. It is Mr. Demas.

9 MR. GOLTZER: He would be distracted anyway.

10 THE COURT: Yes. Absolutely.

11 (Jury present)

12 THE COURT: Ladies and gentlemen, everyone can be  
13 seated. If we can have a sidebar with Mr. Demas.

14 (At sidebar)

15 THE COURT: Mr. Demas, I understand that you have had  
16 a family emergency that you need to deal with?

17 JUROR: Yes.

18 THE COURT: I have discussed it with the parties, and  
19 we agree that we are going to go ahead and excuse you. You  
20 will be excused from the jury. I want to thank you for showing  
21 up every day and being prompt and paying attention as you have.  
22 But we are close to the end and I think what we need to do is  
23 continue with the trial and let you take care of your family.  
24 OK?

25 JUROR: All right.

E8knchr7

1 THE COURT: With the thanks of all of the parties,  
2 thank you so much for showing up and doing your duty. I hope  
3 that everything is well with your family. OK?

4 JUROR: Thank you.

5 THE COURT: Yes, sir. You have a good day.

6 (In open court)

7 THE COURT: Ladies and gentlemen, unfortunately,  
8 Mr. Demas had to deal with a family situation. With the  
9 consent of the parties he has been released from the jury.

10 Ms. Yul, would you please take seat No. 10.

11 THE COURT: With that I believe Mr. Goltzer on behalf  
12 of Mr. Whitaker will make the first closing on behalf of the  
13 defendants, for the defendants.

14 MR. GOLTZER: Thank you, Judge.

15 May it please the Court, ladies and gentlemen of the  
16 jury, good afternoon. I listened with great interest to my  
17 learned adversary's summation, as I'm sure you did.

18 As he was describing the scene in the apartment what  
19 popped into my mind was a moment when Mr. Baynes was on the  
20 witness stand and the government after its opening statement  
21 and after my opening statement had started to change its theory  
22 about the fable of blood being on Mr. Whitaker. And the  
23 government said to Mr. Baynes, I forget which prosecutor it  
24 was, Tell us, Mr. Baynes, as you were running out of the  
25 apartment trying to get away from the scene of this terrible

E8knchr7

Summation - Mr. Goltzer

1 chaos and this terrible robbery, did you happen to brush up  
2 against Mr. Whitaker so he could get blood on himself?

3 And Mr. Baynes said, No, it never happened.

4 Why is that significant?

5 I spent a lot of time questioning Mr. Frederick, who  
6 wears many hats up in Newburgh, about the outer clothing and  
7 the blood, and I spent a fair amount of time questioning the  
8 medical examiner about the internal bleeding of the unfortunate  
9 Mr. Henry.

10 The reason I did it, and I think you will understand  
11 it, is that it's clear that if you believe Mr. McDermott, you  
12 believe for a minute that he's telling you the truth about  
13 Tyrell Whitaker being covered, as he said, with blood from his  
14 solar plexus to his thighs, then you will likely believe that  
15 Tyrell Whitaker is guilty of taking part in the robbery on  
16 December 15, 2010, and being guilty not only of the robbery,  
17 but of the possession of a weapon under circumstances involving  
18 murder in the first degree.

19 If you believe that, it would be a terrible tragedy,  
20 because he's not guilty. And the government changed its  
21 theory. As they opened they said somebody said, Go through his  
22 pockets. Now we know and the government now concedes in its  
23 closing statement that that could not have happened. There was  
24 no blood on the outer clothing. There wasn't enough blood on  
25 that red jacket to take a swab of it. When they went to the

E8knchr7

Summation - Mr. Goltzer

1     unfortunate Mr. Henry at the second location, his clothing was  
2     closed. There was no blood trail between the first and the  
3     second location, and when they went through his pockets later  
4     on they found crack and a wallet.

5             It never happened. If anybody said that on a tape, it  
6     never happened. No robber went through his pockets.

7             How, then, does Mr. McDermott come up with Tyrell  
8     Whitaker being covered with blood? He says it happened. Could  
9     he be lying?

10            Well, of course he's lying.

11            Number one being Tyrell Whitaker wasn't even there.

12            Number two, if you listen to the testimony of the  
13     witnesses in the case that they claim are telling the truth,  
14     primarily Mr. Baynes, and you look at the diagram that  
15     Mr. Baynes put on the board, if it was him, and it wasn't, he  
16     couldn't have come in contact with blood.

17            So what they do after my opening statement is they  
18     take McDermott into the back room two weeks ago, and now they  
19     change things around. He wasn't covered with blood as I told  
20     them so long ago from his solar plexus to his thighs, no.  
21     Actually, it was little polka dots. Do you remember that?  
22     Little polka dots, as if somebody had splashed water on the  
23     wall.

24            The government says, Don't worry. Everything's fine.  
25     The evidence is overwhelming.

E8knchr7

Summation - Mr. Goltzer

1 I have the greatest respect for my learned adversaries  
2 at this table. They are employees of the United States  
3 government. They went to law school, as we did; they get paid  
4 a salary, as we do; and, like most of us, with the exception of  
5 Ms. Stafford, they put their pants on one leg at a time. She  
6 wears a skirt most often.

7 Anybody who can tell you with a straight face that the  
8 case against Tyrell Whitaker is overwhelming has been smoking  
9 too much of the product that Mr. McDermott was selling in  
10 Newburgh, and that's the truth of it.

11 We are here because Tyrell Whitaker pled not guilty.  
12 We are here because, unlike the witnesses they called, he chose  
13 not to put faith in the government. He chose to put faith in  
14 you. He said, I want a jury trial. I plead not guilty. I am  
15 not guilty. They have to prove the case beyond a reasonable  
16 doubt, and I tell you they've not done it.

17 The case against Tyrell Whitaker when the icing is  
18 scraped from the cake comes down to Baynes, Mallory and  
19 McDermott. I will demonstrate to you that every one of those  
20 three witnesses has perjured himself in this courtroom. They  
21 did it in front of you. I will show you what it is and I will  
22 show you it is material and significant lies that they have  
23 told.

24 One of the things I am afraid of is that you will say,  
25 How can you say that about people? I mean, they took an oath.

E8knchr7

Summation - Mr. Goltzer

1 Why would they lie if they took an oath?

2 You have not been exposed to this variety of creature  
3 in your normal lives. This is not the common experience that  
4 you have gone through over the last months or years. You have  
5 not met and dealt with people like this.

6 You have to suspend the common ideas you have about  
7 the human condition to understand who these people are and how  
8 they are prepared and what's been going on.

9 They say there are two things in this life that you  
10 don't want to be a part of:

11 Number one, you don't want to be in the back of a  
12 butcher shop when they are making the sausage, because you  
13 don't want to know what goes into it; and,

14 Number two, you don't want to be in the back room when  
15 these guys are being prepared for 50 hours to testify in front  
16 of a jury.

17 So they've got three witnesses against Tyrell Whitaker  
18 and a tape, and we're going to talk about that tape at length.

19 Before I do that, I want to let you know that the two  
20 hardest working people in this courtroom are the court  
21 reporters. They have taken down every word that's been  
22 uttered, and taking down the words of those couple of witnesses  
23 had to be the toughest job that they have ever had.

24 Impossible.

25 I have read the 2,000 pages or so of this transcript



E8knchr7

Summation - Mr. Goltzer

1 more than once. So have the other lawyers in the case. It is  
2 a tremendous responsibility trying a murder case when you are  
3 representing a young man who is presumed innocent in a federal  
4 court of law. You really need to work hard. You need to read  
5 the record; you need to read the prior statements; you need to  
6 stay up real late at night.

7 We all make mistakes. We all miss things. That  
8 record is available to you. Every word of this trial has been  
9 preserved accurately by these hard-working reporters. I  
10 encourage you, if there's something we say that you think is  
11 wrong, and your notes don't reflect it, go back to the  
12 transcript. Take your time. It's too important not to.

13 Before I talk to you about the witnesses, I want to go  
14 through some general principles.

15 Number one, my folks always told me it was impolite to  
16 point a finger at somebody. Prosecutors like to point fingers.  
17 These three men.

18 No, no, no. I don't represent three men. I represent  
19 one young man. His name is Tyrell Whitaker, and I represent  
20 him along with Ying Stafford. There are three separate trials  
21 going on here, as the judge will tell you. Each of these  
22 trials represents one of these young men.

23 I am going to talk to you about the case such as it is  
24 against Tyrell Whitaker. I am not going to say anything to  
25 step on my colleagues' toes. I'm not going to comment about

E8knchr7

Summation - Mr. Goltzer

1 their clients. That's not my place. I will talk to you about  
2 Tyrell Whitaker.

3 You have heard a lot of evidence in this case about  
4 guns, drugs, gangs, Lord knows, Newburgh, New York.

5 Part of the psychology of a trial in the effort to win  
6 a trial is to get you to be afraid of the man on trial. It is  
7 to get you to dislike the man on trial.

8 MR. BAUER: Objection, your Honor.

9 THE COURT: Overruled.

10 MR. GOLTZER: They will deny it.

11 THE COURT: I overruled the objection.

12 MR. GOLTZER: They will deny it, but that's the way it  
13 works.

14 I hope and I pray that you will be strong enough to  
15 follow the Court's instructions and to follow your oath. If  
16 you believe that Tyrell Whitaker sold some drugs out there on  
17 the streets of Newburgh to make a couple of extra bucks because  
18 he grew up on the hardscrabble streets and didn't have a real  
19 job for a while, so be it.

20 But you are not going to solve the problems of the  
21 world by convicting an innocent man of a murder he didn't  
22 commit because you don't like the way he made a few extra  
23 dollars. That's not the way it works.

24 If you believe that a couple of days before this  
25 tragedy he brought back a gun from a robbery that he didn't

E8knchr7

Summation - Mr. Goltzer

1 commit as reflected on the Burden tape, that's not a reason to  
2 convict him of a murder that he didn't commit. That is nothing  
3 that I would justify if it were true, but he's not charged with  
4 possesssing a gun two days before on a robbery that never  
5 happened. He's not charged in this indictment with reaching an  
6 agreement with anybody or conspiring to commit other robberies,  
7 and he's not charged in a drug conspiracy.

8 He is charged with one simple event, the December 15,  
9 2010 robbery. If you are not convinced beyond a reasonable  
10 doubt that he took part in that particular narrow crime, he is  
11 absolutely entitled to your verdict of not guilty, and it  
12 doesn't matter what you think about the life he used to lead,  
13 his lifestyle, or who his friends are.

14 Gangs. You have heard so much about gangs, and,  
15 again, it's hard for me to understand why. No one suggests  
16 that Mr. Christian was in a gang with the other two gentlemen.

17 They called Mr. Evans to the stand. I didn't.  
18 Mr. Evans was the best of friends with Burden. You heard him  
19 say it, their witness.

20 Was Mr. Whitaker a Blood?

21 No, he was not.

22 Was Mr. Whitaker obliged to take orders from anybody  
23 in the Bloods, be it L-1 or Mr. Kevin Gotti, Burden?

24 No.

25 There were associates or hangers on who were permitted

E8knchr7

Summation - Mr. Goltzer

1 to sell a couple of decks of heroin or a little bit of crack on  
2 the street?

3 Yes.

4 You were a Blood for a number of years. You were  
5 involved in a case out of this very office where they indicted  
6 and arrested 72 or 73 alleged members of the Bloods as part of  
7 an enterprise, weren't you, Mr. Evans?

8 Yes, I was.

9 Was he part of that enterprise?

10 No.

11 Was he part of that indictment?

12 No.

13 Were they part of that indictment?

14 No.

15 Were they part of that enterprise?

16 No.

17 Yet with a straight face my learned adversary stood up  
18 before you and said it was all about the Bloods. He was a  
19 Blood.

20 If that wasn't enough, they called Danielle  
21 Williams, the charming lady who arranged for the robbery of her  
22 sister's husband while her sister was suffering from cancer.

23 One, of course, needs to understand Ms. Williams. She  
24 wasn't arranging for the robbery of her sister. She was  
25 arranging the robbery of her sister's husband. That's her

E8knchr7

Summation - Mr. Goltzer

1 rationalization. God bless her. She was cooperating with the  
2 government while she was still intimate with Double O,  
3 Mr. Boykin, the head Blood, the head of the enterprise.

4 Did I say something wrong?

5 (Counsel conferred)

6 MR. GOLTZER: Some Boykin, the head of the Bloods,  
7 right?

8 MR. BAUER: Yes.

9 MR. GOLTZER: I said something wrong. It happens.  
10 We're human. So she's intimate with this guy who's the head of  
11 the Bloods. The king of the enterprise, the man who keeps the  
12 books. She's taking messages to and from the Bloods.

13 She knows Tyrell Whitaker, who is affectionately  
14 called Bow Wow by everybody, and she knows him as a kid who  
15 hangs out with her son who she affectionately called Smoke.  
16 You can't make it up.

17 They said to her, was he a Blood?

18 What was her answer? Not that I know of.

19 Well, who would know? McDermott? The fly on the  
20 wall, who hears all the meetings when he's not supposed to be  
21 there? Baynes, who we will talk about in a little while?

22 Mallory. That creature. They say he is a blood.

23 The two people who knew most about the Bloods in this  
24 courtroom told you he wasn't a blood.

25 This fellow Evans got together with their absent

E8knchr7

Summation - Mr. Goltzer

1 witness, Burden, twice a week for years. And he sat down with  
2 Burden over drinks, to say the least. And when the sun went  
3 down Burden would begin to drink. Burden would drink three  
4 bottles in a night, Hennessy, vodka, God knows what else.

5 Burden was an alcoholic. Burden's brain was likely  
6 fried. He didn't see him on Monday through Friday according to  
7 his testimony.

8 But do you think an alcoholic like that didn't drink  
9 during the week, and he only drink six bottles of booze on the  
10 weekends?

11 Out of all the things that Evans told you about  
12 Burden, he never told you that Burden told him that he was a  
13 Blood. Quite the contrary.

14 Of all the things that Burden may have confided in  
15 him, he never told him that Bow Wow was involved in a killing.  
16 The only person who claims to be able to tell you that he was  
17 covered with blood and was involved in a killing was McDermott  
18 and Mallory.

19 Let's spend a couple of minutes talking about  
20 Mr. McDermott. Interesting fellow. He claims that Bow Wow  
21 came to the house covered with blood -- or sprinkled with  
22 blood. Now it's different.

23 Is he a credible person? Is he an honest person? Is  
24 he someone you would trust in your own affairs?

25 Let's see how reasonable his testimony was.

E8knchr7

Summation - Mr. Goltzer

1           He told you a story about a guy named Snelly. The  
2 reason I'm telling you this is if you find that a witness lied  
3 about one thing, that's important. The judge will tell you  
4 that you are entitled to throw out all of the witness'  
5 testimony, because if somebody is willing to lie about  
6 something that's important in a courtroom, they can lie about  
7 everything, and you don't have to believe anything they say.  
8 You can take part of it if you like, but you don't have to.

9           So, here I am. My name is McDermott. I am a dancer.  
10 He came here on a workman's visa, with my manager at the age of  
11 15. A wonderful country, the United States. It gave me a  
12 chance to go to the place of my dreams, Schenectady, New York.

13           After I went to Schenectady, I decided to go to the  
14 garden spot of New York, Newburgh New York. There I decided  
15 that I could make \$10,000 a week until that crafty defense  
16 lawyer reminded me how much money I wasn't paying taxes on, and  
17 then it occurred to me that most weeks I was losing money. But  
18 that's OK. I was making \$10,000 a week. And I used to sell  
19 out of this little spot at 260 First Street or First Avenue in  
20 Newburgh.

21           I was hearing everything that went on. It was  
22 convenient. It really was. I was there when they talked about  
23 planning a robbery. I was there when he came back with blood.  
24 I was there later on when people were confessing. I'm a lucky  
25 guy because it gives me something to sell to the government to

E8knchr7

Summation - Mr. Goltzer

1 avoid being deported so I don't get killed.

2 And this guy Snelly, I don't know, he comes up to me,  
3 and he's ten feet away, and he pulls out a .357 magnum, right?  
4 A gun that Dirty Harry would be proud of. And he points the  
5 gun at me and he pulls the trigger and he says, You better not  
6 talk. It wasn't very close because it only went through my  
7 shirt on the left side.

8 Did you think he was trying to hit you?

9 No.

10 Did you think it was a charitable act on his part?

11 No.

12 Did you think he was like Anne Oakley and he was such  
13 a good shot that he could put the bullet through your shirt?

14 Objection.

15 Overruled.

16 No.

17 Did you get the idea that the Bloods were trying to  
18 kill you?

19 Could be.

20 Did you hire a bodyguard with the \$10,000 that you  
21 were earning?

22 No.

23 Did you buy a bulletproof vest with the \$10,000 that  
24 you were earning?

25 No.



E8knchr7

Summation - Mr. Goltzer

1 Did you take any efforts to protect yourself?

2 No.

3 Did you run away?

4 Well, I stayed away.

5 For how long?

6 Two months. Wait, wait, excuse me. Let me change my  
7 answer. Two days.

8 There were a lot of Bloods in Newburgh?

9 Yes.

10 You thought they might want to kill you?

11 Yes.

12 Are you brave or crazy or both?

13 No.

14 And then I asked him a simple question: Why didn't  
15 you run away? Do you remember that?

16 And he sat there. He looked like the deer in the  
17 headlights.

18 There is a rule among lawyers. It is a very good  
19 rule. Judges will tell you it's the same rule too. Never ask  
20 a witness why. Because if you ask a witness why, they could  
21 say anything in the world and they can just destroy you.  
22 There's only one time you can break that rule, and that's when  
23 you know the witness can't answer the question.

24 Why didn't you run away?

25 And he sat there shaking his head.

E8knchr7

Summation - Mr. Goltzer

1 I don't know, no reason, or words to that effect. I'm  
2 not quoting him verbatim.

3 That's Mr. McDermott.

4 Let me ask you a question. Do you think that this  
5 fellow Snelly actually fired the .357 magnum at Mr. McDermott?

6 Do you think that ever happened?

7 If someone from the Bloods had fired a gun at  
8 Mr. McDermott and came within a half an inch of putting a .357  
9 bullet into his torso, where would he have gone? California?  
10 Cleveland? Syracuse?

11 Would you have stayed in Newburgh? Would anybody have  
12 stayed in Newburgh?

13 He didn't have a wife and child here. He didn't have  
14 a business that he couldn't move to Colorado where they don't  
15 arrest people for selling \$10,000 worth of weed a week.

16 What's that about?

17 The government says it's an overwhelming case. These  
18 guys are wonderful witnesses. They have every reason to tell  
19 the truth. Maybe the government thinks they have every reason  
20 to tell the truth, but you have to know they are lying.

21 The government says, yeah, they told lies back in the  
22 day, but they don't lie now, because they want the letter.

23 That is a whole other topic that I'm going to talk to  
24 you about now.

25 If you think that what I'm telling you is damaged

E8knchr7

Summation - Mr. Goltzer

1 goods, don't accept it. Don't tell me to sit down because I'm  
2 not done yet. But just don't accept it.

3 You don't have to listen to me. I'm just a lawyer.  
4 And you don't have to listen to them, because they are just  
5 lawyers.

6 They like to say we represent the United States of  
7 America. If they put Lois Lerner on the stand, they would tell  
8 you she was telling you the truth about the e-mails, that the  
9 seven computers just happened to die. That is your government,  
10 too. Don't buy into it.

11 By the way, this government has technology that is so  
12 fantastic that they can read your license plate probably from  
13 the other side of the moon. That is how good it is. They can  
14 get phone records. They have cell sites that can tell you  
15 where the telephones have been. They can trace your movements  
16 and the movements of your friends.

17 They haven't done it in this case. If everybody had a  
18 cell phone, why don't we have cell phone records.

19 The judge will tell you they don't have to do  
20 anything. They are not required to do things. That is true.  
21 They are not legally required to do it, but you are entitled to  
22 consider its absence if you wish.

23 We have this notion that their witnesses are supposed  
24 to tell the truth. Here you have this character McDermott, who  
25 gets involved in a robbery and says to the police, I was just

E8knchr7

Summation - Mr. Goltzer

1 going to buy a bag of weed. Three people were giving me a ride  
2 to buy a bag of weed. I went into the store. I don't know  
3 what happened.

4 I mean, these guys pulled guns. What was that about?

5 I started to leave, somebody stabbed me, I stabbed  
6 him. I don't know where I stabbed him, although I did tell  
7 them back then that I stabbed him in the head, though he  
8 doesn't president to admit that to you.

9 He seems to remember that one of the guys was wearing  
10 a certain kind of shirt that happens to match the shirt that he  
11 was wearing and sneakers that happened to match, and the guys  
12 had blood on them. It is not a big deal. It is just that New  
13 York is a remarkable environment for coincidence.

14 Probably the best question in the trial was asked by  
15 Mr. Dratel: Didn't you just take that description and transfer  
16 it to this case?

17 I wouldn't do that.

18 He keeps his mouth shut about all this stuff until he  
19 gets picked up for the assault, and he realizes he didn't beat  
20 it, and he takes a plea in front of a state court judge and he  
21 gets a promise of seven years -- not 25, seven. But that is  
22 not good enough for him. So now he comes forward and says, I  
23 can help you on this case.

24 He's been in the Orange County jail with another one  
25 of their witnesses, and after he's been in another jail with

E8knchr7

Summation - Mr. Goltzer

1 the third witness against this man, who happened to tell him,  
2 Baynes happened to tell him who was involved in the case, and  
3 you don't think Mr. McDermott was smart enough to figure out  
4 what he was supposed to say?

5 They were friends and they were close and there's no  
6 tape and you don't know what they talked about or how they  
7 talked about it.

8 The government says, You think there was a conspiracy,  
9 as if to mock the argument. You better believe there was a  
10 conspiracy. Every one of their witnesses knew what they had to  
11 sell, and they did their best to sell it. Of that there is no  
12 doubt.

13 He is going to be deported. Now they call it removal.  
14 He is going to be sent back to Jamaica after he serves the  
15 better part of seven years in the penitentiary. As far as he's  
16 concerned, he is going to die when he gets there because of  
17 some situation involving his father. He was asked pointblank,  
18 Would you lie to save your life?

19 His answer, after a great deal of pause and  
20 reflection: Anybody would.

21 He lied to the police back in the day. He's willing  
22 to lie to save his life. He's lying to you about Snelly. He's  
23 lying to you about the blood.

24 If you accept my argument, you have to take him and  
25 throw him out of the case. By the way, I don't have to prove

E8knchr7

Summation - Mr. Goltzer

1 to you that he's lying. They have to prove to you that he's  
2 good and telling the truth. How does that sound for an  
3 assignment for my learned counsel, for the government?

4 If a lawyer stood up and told you their witnesses got  
5 together and talked about this case before they cooperated you  
6 would say, You're paranoid. But it's true.

7 To show you what a remarkable environment for  
8 coincidence New York State is, isn't it strange that both of  
9 these men began to cooperate in January of 2012?

10 Yes, Mr. Mallory and Mr. McDermott, both began to  
11 cooperate in January of 2012 after they had spoken to each  
12 other in jail. Baynes knew that he had to get support for his  
13 story to get his deal. He knew Mallory, he knew McDermott, and  
14 they talked.

15 Who is dealing more in speculation, me or Mr. Bauer?

16 If I tell you they talked and you can't trust it and  
17 you don't know what they talked about, so you can't assume they  
18 didn't talk about this case and conspire, am I speculating more  
19 than Mr. Bauer when he says they must have traded guns or they  
20 could have traded guns?

21 When Mr. Nawaday gets up in his rebuttal summation, I  
22 challenge him to show you one syllable in this evidence that  
23 anybody traded a gun.

24 Why does Mr. Bauer have to suggest to you that  
25 somebody could have traded a gun?

E8knchr7

Summation - Mr. Goltzer

1           It's not complicated. It goes back to Mr. Baynes.  
2       Speaking of Mr. Baynes, I read this record so closely. Yet, as  
3       I was listening to the closing statement, I heard Mr. Bauer say  
4       according to Baynes, Baynes didn't have a mask. Remember? He  
5       goes to the scene at Chambers Street and tells you that the  
6       men, the victims are robbed outside. And Bow Wow said to him,  
7       Mr. Baynes was told by Bow Wow, stay outside, you don't have a  
8       mask, you will be the lookout.

9           And I recalled, don't ask me why, page 481 of the  
10       transcript. If you are going to take a note of the page of a  
11       transcript, take a note of page 481, because it is on that page  
12       where he says that.

13          He says, Bow Wow said to me, you don't have a mask,  
14       you stay outside. You be the lookout. It's on the same page  
15       where he says those guys pulled their guns and outside of the  
16       building robbed those people before they went in.

17          And my dear colleague, Mr. Bauer, states it as if it  
18       was holy writ etched in stone brought down from the mountain by  
19       Moses, because it was said under oath: It's got to be true,  
20       because he's got every reason to tell the truth and he's got no  
21       reason to lie.

22          But it occurred to me, there is a minor problem with  
23       that premise, Mr. Bauer. You see you called a guy named Boone,  
24       who didn't want to be here. He was the well-built fellow who  
25       claims he was brought into the bathroom because nobody wanted

E8knchr7

Summation - Mr. Goltzer

1 to fool with him. That you can believe. I wouldn't want to  
2 get into a fight with him either.

3 And Mr. Greenfield said to him three or four times,  
4 Listen, I want to make sure: You are a victim. You don't want  
5 to be here. You are getting home in six weeks. You want a  
6 letter. Maybe you'll get home a week earlier, who knows. But  
7 you are going to get a letter. You are not looking at life in  
8 the penitentiary. You are getting immunity for other crimes.  
9 You're here because you have to be here. Their witness.

10 Did anybody pull a gun on you and rob the guys who  
11 were standing outside?

12 Never happened.

13 Right?

14 Are you sure it never happened?

15 I was there. It never happened. Stop asking me the  
16 question. I told you that already.

17 Never happened, their witness.

18 They called Smith?

19 Smith was another victim. He's inside, and he's  
20 inside with Boone. He is another guy. I don't want to be  
21 here. I don't need to be here. The government: Here's an  
22 order; you got to be here. The Court: Here's an order, you  
23 got to be here.

24 You stabbed somebody?

25 I did. I stabbed the son of a bitch twice. He tried



E8knchr7

Summation - Mr. Goltzer

1 to rob me, pulled a gun on me, wrestled the gun away.

2 Did he have a mask?

3 They all had masks.

4 Who did he stab? Baynes.

5 Their two witness: Baynes had a mask. Baynes was  
6 inside. Baynes was a robber. Baynes swore under oath. Bow  
7 Wow told Baynes because I don't have a mask you stay outside  
8 and be a lookout.

9 If the two witnesses called by the government who were  
10 victims of the crime, who were involved in a struggle with a  
11 masked robber who was stabbed and who was Baynes, who are  
12 corroborated by the blood, the real blood in this case, if  
13 those two witnesses or even one of them are telling the truth,  
14 then Baynes lied about him about something important, about  
15 something material, and that's just the beginning of  
16 Mr. Baynes.

17 I asked a couple of witnesses whether they ever  
18 falsely accused somebody of a crime, a serious crime.

19 We will get to Mallory in a minute, a few minutes.

20 I asked Mr. Baynes if he had been provided with  
21 Miranda warnings. Do you remember that?

22 We introduced into evidence a very simple piece of  
23 paper. It is a Miranda warnings form with Mr. Baynes'  
24 signature on it.

25 I asked Mr. Baynes whether that was his signature on

E8knchr7

Summation - Mr. Goltzer

1 it. He said it looked like his signature. It was his  
2 signature.

3 I asked him if he signed it.

4 His response was telling, not only was it telling, it  
5 was stunning.

6 Well, there are computer-generated signatures you  
7 know.

8 Did you ever get Miranda warnings?

9 Never happened.

10 You see the names of two detectives on here.  
11 Detective Cortez and Detective Staton. They signed it. By  
12 signing it, they were saying that they gave you these warnings  
13 and these were your answers and they had this conversation.

14 Never happened. Could be a forgery. False, lies.

15 We have a stipulation that was read to you by  
16 Ms. Stafford today. It says that there was a hearing up in  
17 Orange County called a suppression hearing. She read you the  
18 Cortez testimony which he gave under oath. He said, I gave him  
19 his Miranda warnings. I had the sheet and I read off of the  
20 sheet.

21 I said to the man, do you know you have a right to  
22 remain silent and anything can be used against you?

23 Yes.

24 Do you understand?

25 Yes.

E8knchr7

Summation - Mr. Goltzer

1           You have a right to a lawyer?

2           Yes. It's all on here.

3           And what did he say to you?

4           He said, I understand. I'll talk to you.

5           Don't you understand that Mr. Baynes is either  
6 suffering from a terrible mental disability in terms of his  
7 memory, or else he is falsely accusing police officers of  
8 perjuring themselves under oath at a hearing up in Orange  
9 County when they swore on a bible that they gave him the  
10 warnings and he signed it.

11          What the heck is that about?

12          Another reliable witness, Mr. Bauer. Someone else we  
13 can readily believe, Mr. Nawaday.

14          Folks, please, this is too important for that kind of  
15 thinking.

16          So Baynes, who is not a lookout, Baynes who is a  
17 robber, Baynes who's got a mask, Baynes who's got a gun, goes  
18 into the premises, and he gets stabbed. Of that there is no  
19 dispute.

20          And he goes to the hospital, and he's sitting there at  
21 around 12:30 in the morning. And he decides that he's going to  
22 lie his way out of it. As he said in response to my questions,  
23 I was going to mix truth and lies.

24          There is a new program on TV. It's called Legends. I  
25 haven't seen it yet. It starts probably tonight. Maybe I can

E8knchr7

Summation - Mr. Goltzer

1 see it because I will be done with my summation tonight. It's  
2 about a spy who's like an undercover guy for the CIA. He makes  
3 believe he's somebody else, and he gets involved in these  
4 undercover roles.

5 What he says, at least in the trailer, You got to make  
6 the lie as close to the truth as possible, because then it's  
7 easier to tell.

8 If you think about it, that's probably true. If you  
9 make the lie close to the truth, it's easier to remember. It's  
10 easier to keep straight.

11 So, what does he tell the police?

12 Loscerbo, he basically says to Loscerbo at about 1  
13 o'clock in the morning, there are four of us. It's me, it's  
14 Quay Quay, Bash, and Baby E, who happens to be dead. And those  
15 two guys decided they wanted to commit a robbery, not me and  
16 Quay Quay. No, no, no.

17 Heaven forbid that we should be involved in a robbery.  
18 We were walking down -- no, first he says I was walking down  
19 the street, and I saw a group of guys and they shot me.

20 That wasn't going to work. Then he says, They wanted  
21 to do a robbery, and we left. And then we went back to see if  
22 they were going to do the robber, and then I got shot. One of  
23 them had a silver revolver, a chrome revolver. The other one  
24 had a gun, too.

25 The government said in its opening statement he lied

E8knchr7

Summation - Mr. Goltzer

1 to protect his friends. Well, he wasn't lying to protect Bash  
2 and he wasn't lying to protect Baby E. He was lying to protect  
3 himself, and he was lying to protect his best friend, Quay  
4 Quay. He told any number of lies that he mixed with the truth.  
5 He must have given three or four different versions to the  
6 police.

7 He told them. Some of them are in the stipulation,  
8 others he admitted on the witness stand. I can't keep them  
9 straight. But we know that he told any number of lies, and we  
10 know that the police confronted him with it.

11 We know you were inside. Oh, yeah, yeah, yeah. I'll  
12 tell you the truth now. I did go inside because I wanted to  
13 make sure that Quay Quay's brother was OK.

14 So he came up with that excuse. He came up with  
15 excuse after excuse.

16 But there was one constant throughout everything that  
17 he said. He never mentioned Bow Wow. He never mentioned  
18 Tyrell Whitaker.

19 They can't think of and you won't be able to think of  
20 any reason that he wouldn't have given him up if he was there,  
21 because he didn't have the kind of relationship with Tyrell  
22 Whitaker that he had with Quay Quay.

23 And through all the lies and all the evasions, he  
24 never mentioned Tyrell Whitaker in the hospital through the  
25 hours and hours, as he said, that he was questioned.

E8knchr7

Summation - Mr. Goltzer

1           On direct examination, when asked by the prosecutor  
2           what he remembered telling them during the hours and hours that  
3           he was questioned, all that he could recall was telling the  
4           police, I went into a weed spot to buy weed and I got stabbed.  
5           I walked in on a robbery and I got stabbed. That's all I  
6           remember.

7           Do you remember anything else of the hours and hours  
8           of questioning?

9           No.

10          Nonsense. That's under oath here. Nonsense.

11          Either his brain is fried or he's lying. In either  
12          case, you can't depend on him.

13          Why does the government in its closing statement have  
14          to suggest to you, without any support in the record, that  
15          these folks traded guns?

16          It is a little complicated. I beg you, follow me. I  
17          know it's getting late, but his future is on the line, and I  
18          need for you to understand this.

19          It has always been the government's contention through  
20          the tapes, the Burden/Mallory tape, Tyrell Whitaker on the  
21          night of the robbery, and I tell you he wasn't there, had the  
22          chrome gun with the wheel, the .38.

23          A weapon that parenthetically, although it is of some  
24          interest, could not have killed anyone.

25          MR. BAUER: Objection.

E8knchr7

Summation - Mr. Goltzer

1 MR. GOLTZER: That night.

2 THE COURT: Overruled.

3 MR. GOLTZER: Because the bullets that came out of him  
4 were two semiautomatic bullets. Obviously, the gun could have  
5 killed somebody, but it didn't that night.

6 There's no dispute about that. In fact, their own  
7 expert, Mr. Frederick, was asked by one of these lawyers when  
8 he came back the next day: Do you know now whether you can  
9 fire a semiautomatic .380 or a nine-millimeter from a .38?

10 He says, yes.

11 How do you know?

12 I tried it last night, and it doesn't work.

13 So we know that that particular gun didn't kill  
14 Mr. Henry.

15 But we also know that Baynes was saying that Baby E  
16 had that gun. If Baby E had that gun on the night of the  
17 robbery, he didn't. No one said there were two silver  
18 revolvers. Quite the contrary. So to get that gun into Baby  
19 E's hands, the only thing they can ask you to assume is that  
20 Whitaker gave it to him.

21 But we don't convict people of murder on assumptions.  
22 There's no evidence in the case that anybody traded guns. Why  
23 he said it, perhaps Mr. Nawaday will explain to you in the  
24 rebuttal submission, but it won't fly.

25 Do you think Baynes, who was mixing truth and fiction,

E8knchr7

Summation - Mr. Goltzer

1 was lying about the silver revolver? Why would he?

2 He had to give them something. He had to give up a  
3 couple of people. On the day it happened, in the hospital, he  
4 told the police again and again, They both had guns. One of  
5 them had a silver or chrome revolver. That's the only silver  
6 or chrome revolver in the case.

7 They are relying on an absent witness who I'll never  
8 get to cross-examine by the name of Burden, an incurable  
9 alcoholic whose brain is probably fried as bad as Baynes.

10 Something interesting happened during that tape, and  
11 I'm not for a minute telling you to believe any of it. It is  
12 just an unreliable tape, and we will talk about that.

13 What they can't get over and what Mallory couldn't get  
14 over was Mallory says: Listen let me refresh your  
15 recollection. He thought he was a courtroom lawyer. Let me  
16 refresh your recollection. It was Bow Wow and Gucci.

17 He didn't give the guy a chance to say hello and  
18 finish his drink before he said, Let me refresh your  
19 recollection. It's Bow Wow and Gucci.

20 He knew what his agenda was. You gave the gun to Bow  
21 Wow.

22 What did Burden say?

23 No, I gave the gun to you.

24 Were you happy to hear that, Mr. Mallory?

25 No, no, no.



E8knchr7

Summation - Mr. Goltzer

1 Were you surprised to hear that, Mr. Mallory?

2 Yes, yes, yes.

3 If it's true, if they were talking about the night of  
4 the robbery, and if Burden gave that gun to Mallory, Mallory  
5 gave it to Baby E. He never had it.

6 Mallory was talking about him bringing the gun back  
7 two days after the robbery. Do you remember that?

8 On direct examination: Did you ever see the guns  
9 again?

10 Yes.

11 When?

12 Two days after the robbery Bow Wow brought the gun  
13 back, complained it didn't work. Burden said put the gun into  
14 your hand and shoot yourself. No way. He shot it out the  
15 window, put the bullets in it and shot it out the winnow. If  
16 there were no bullets in the gun, how do you know it didn't  
17 work. What do you have, an unloaded gun, and you knew it  
18 didn't work? But put that aside.

19 Then, knowing that on the tape Burden says it was two  
20 days before and it involved a robbery that never happened,  
21 Mallory says again on direct: It happened twice.

22 The odds of that particular thing happening twice  
23 where he complained about a gun not working two days before the  
24 robbery and two days after the robbery seems somewhat far  
25 fetched.

E8knchr7

Summation - Mr. Goltzer

1 Was it before or after?

2 I think it was before.

3 Did you see a gun after the robbery?

4 I did.

5 Question on cross-examination: Did you happen to tell  
6 police a long time ago in these proffer sessions when you were  
7 supposed to tell the truth, I never saw the guns again after  
8 the robbery?

9 I don't remember what he said. Quite frankly, it just  
10 slipped my mind. But I do remember that under my  
11 cross-examination he said, when I told him that I was trying to  
12 tell him the truth and he ultimately said, you know what, I  
13 never saw the guns after the robbery.

14 So here's Mallory in a court of law in a murder case,  
15 being told on a tape, I gave you the gun, I saw the gun before  
16 the robbery, I saw the gun after the robbery, now I remember I  
17 never saw the guns again.

18 It's the government's position that this is an  
19 overwhelming case.

20 It's the government's position that you have nothing  
21 to be concerned about.

22 It's the government's position that they have a brick  
23 piled on top of a brick amounting to a wall of evidence. Well,  
24 folks if you know the Old Testament Joshua fit the battle of  
25 Jericho and the wall came tumbling down.

E8knchr7

Summation - Mr. Goltzer

1           Mallory. I'm going to go back to Burden. I will jump  
2 back and forth. You might notice that I'm not using notes. I  
3 have some notes, but I'm not using them.

4           I don't know why. I just like to talk to folks and  
5 look them in the eyes. Unlike the government lawyers, who have  
6 less gray hair than me, I'm probably a creature of the 20th  
7 century and not the 21st, and I don't have these multimedia  
8 presentations with things going back and forth. If I wanted to  
9 use that, I would have to have my kids come in here and do it  
10 for me.

11           It reminds me in a sense, this multimedia presentation  
12 by the government -- and I have the highest regard for it. I  
13 wish I could do it. She has been working really hard,  
14 Ms. McInerney, and I want to thank her for her help during the  
15 trial.

16           Some of you may know Oliver Stone. He was a director.  
17 He's kind of a little bit to the left of Mao Tse-Tung. He puts  
18 together these wonderful multimedia presentations. I remember  
19 a movie about JFK and everybody conspired, but it was a  
20 fabulous movie. The direction was fabulous. The special  
21 effects were fabulous. The only problem with the movie is the  
22 same problem they had with their movie, the facts are all  
23 wrong. The facts are all wrong.

24           You cannot blithely accept his wall of evidence  
25 without looking at the cross-examination. I understand that we

E8knchr7

Summation - Mr. Goltzer

1 defense lawyers are nothing more than a necessary  
2 inconvenience, that we have the temerity to question the  
3 reliability of some of the people that they have put on the  
4 witness stand, that we have the nerve to question the process  
5 by which they sign them up.

6 You know they always say the same thing: We didn't  
7 pick them, they did.

8 And they always present them the same way: They have  
9 every reason to tell the truth.

10 We lawyers have a name for those cooperation  
11 agreements. You know what it is, jury food. They're feeding  
12 you jury food.

13 There's only one problem with the plate that they're  
14 putting in front of you. Did you ever read those stories about  
15 the picnic where everybody brings food to the picnic and 150  
16 people suddenly double up and they're sick as a dog because  
17 something was tainted?

18 It's like they are bringing you this stew and they  
19 went out and knot the best vegetables, but they got tainted  
20 meat, and they want you to pull the tainted meat out of the  
21 stew and eat it. What we're telling you is, if it is tainted,  
22 throw it out. Don't accept it.

23 A word about Mr. Mallory.

24 Would you falsely accuse somebody of committing a  
25 serious crime?

E8knchr7

Summation - Mr. Goltzer

1 Uh-uh, not me. Wouldn't do it. Wouldn't consider it.  
2 Wouldn't dream of it.

3 Is that, Mr. Mallory, because falsely accusing  
4 somebody of a serious crime is an evil thing to do?

5 It is.

6 A vicious thing to do?

7 It is.

8 A cruel thing to do?

9 That's right.

10 What did you do to L-1 when you claimed he shot  
11 Burden?

12 What?

13 Well, weren't you accusing somebody of a serious crime  
14 that he didn't commit knowing it was a lie?

15 Oh, yeah, I guess I did.

16 Is what you did to him cruel?

17 It was.

18 Vicious?

19 It was.

20 Evil?

21 Indeed.

22 Would you make a false identification in a murder  
23 case?

24 Absolutely not.

25 Do you agree, having looked at the pole camera, that

E8knchr7

Summation - Mr. Goltzer

1 in order to make an accurate identification of a human being,  
2 you would need to see their face, and I used myself as an  
3 example, eyes, hair nose chin or chins, depending.

4 Remember? He absolutely agreed.

5 So if you said that you could identify somebody from  
6 that videotape by their face, that would be a lie?

7 It would.

8 Not my answer, his.

9 Didn't you identify that man as being on that street?

10 It never happened. I said it looked like him.

11 It never happened. Well, let me ask you this: Take a  
12 look at Whitaker's B in evidence.

13 Is that your handwriting?

14 Oh, yeah.

15 Does it is say Bow Wow, January 27, 2012?

16 It does.

17 Is that your initial there?

18 It is.

19 Is that your handwriting?

20 Yes.

21 By putting this on this piece of paper, were you  
22 saying that that was Bow Wow on the tape?

23 Absolutely not. Absolutely not.

24 I mean you do agree that you can't see anybody's face?

25 I do.

E8knchr7

Summation - Mr. Goltzer

1           You do agree that you can't make an identification?

2           I do.

3           Somewhere, not in this courtroom, but somewhere there  
4 is a policeman, whether he is an officer or detective I don't  
5 recall, his name is Bunt. Bunt showed him the video.

6           There was a stipulation read into evidence today by my  
7 cocounsel from that particular policeman, somebody who was  
8 presumably conversant in the English language, somebody who  
9 presumably by training and experience knows how to ask a  
10 question, somebody presumably who by training and experience  
11 knows how to record an answer, and someone presumably by  
12 training and experience who when he doesn't understand an  
13 ambiguity knows to ask the question again.

14           You have his notes. His notes are not ambiguous. He  
15 identified Bow Wow by the light skin on his face, when he  
16 turned to the camera.

17           Perhaps in his rebuttal summation Mr. Nawaday will  
18 suggest to you that there was more than one conspiracy in this  
19 case, that there was a conspiracy by the police officers to  
20 fabricate documents, that that was forged in the same way, that  
21 Baynes' Miranda warning form was forged.

22           You know I'm kidding, right?

23           I mean, if the cop wrote he identified him by his  
24 face, by the color of his skin, which he turned to the camera  
25 that's what happened.

E8knchr7

Summation - Mr. Goltzer

1           Why did he make that statement?

2           Why did Mallory say that, when he admitted that if  
3 that had happened it would have been a lie?

4           It is not complicated. Mallory knew in January of  
5 2012 what they were looking for. Mallory knew who they were  
6 looking for, and he was going to give it to them. Mallory knew  
7 or was smart enough or crafty enough to guess that they had a  
8 certain number of people on that video, and he had to give them  
9 names.

10           What he did was he looked at that video, and he  
11 started to give them the names that he knew they were looking  
12 for. It was an absolute fabrication, it was an absolute lie in  
13 a murder case.

14           You know, because you were here when it happened, that  
15 what I'm telling you about this record is a hundred percent  
16 accurate.

17           You were here when Mallory denied making an  
18 identification.

19           You were here when McDermott couldn't explain why he  
20 didn't run away.

21           You were here when it was explained to you by their  
22 witnesses that there was no way blood could have gone on to  
23 that person.

24           You were here when Baynes was asked, Did you brush up  
25 against the guy? And he said no.



E8knchr7

Summation - Mr. Goltzer

1           You have pictures that show not a lot of blood in that  
2 apartment. You have testimony there was no blood on his outer  
3 clothing. You have Baynes the day it happened putting the  
4 silver gun in somebody else's hand.

5           (Continued on next page)

Eik9chr8

Summation - Mr. Goltzer

1 MR. GOLTZER: (Continuing) You have many reasons to  
2 doubt whether they've proven a case against him beyond a  
3 reasonable doubt. I don't think there's much question about  
4 it, that they haven't proven their case.

5 They have the nerve -- I know I'm being harsh, but  
6 they deserve it -- they have the nerve to ask you to convict a  
7 young man of murder based upon the words of an alcoholic on a  
8 tape when they never called the witness or couldn't call the  
9 witness and we couldn't call the witness for whatever reason.

10 MR. BAUER: Objection, your Honor.

11 MR. GOLTZER: I'll withdraw that.

12 They have the nerve to tell you that Burden is a  
13 reliable witness.

14 MR. BAUER: Objection.

15 THE COURT: Overruled.

16 MR. GOLTZER: A reliable declarant. Understand that  
17 the tape that they played for you was made 20 months after the  
18 fact. Understand that when Mallory was on cross-examination he  
19 blurted out that he was too drunk to remember what accurately  
20 happened way back when.

21 Remember that Baynes and Mallory couldn't remember  
22 what happened in the courtroom the day before they were asked  
23 the question.

24 Remember that those witnesses claimed the ability to  
25 recall what people wore two years ago. And the government's

Eik9chr8

Summation - Mr. Goltzer

1 reason for him remembering that is he used to sell stolen  
2 clothing and was interested in people's wardrobes. Maybe we'll  
3 put him to work for Brooks Brothers when he gets out.

4 We need to understand this process to fairly evaluate  
5 the arguments put forth by the government about their  
6 witnesses. One would think that the government approaches  
7 people or people approach the government and say: Listen, you  
8 know, I'm facing a thousand years in the penitentiary and I'd  
9 like to be your witness. The government says: Fine, here's a  
10 cooperation agreement. Now, I want you to tell the truth.  
11 Then they come in and they tell the truth and the government  
12 says: Thank you very much. And they get time served. That's  
13 not the way it works.

14 These folks, agents, prosecutors, sit down with people  
15 for hours and hours and hours. And they decide what the truth  
16 is. And then they give them the agreement. And then they have  
17 them take a plea to everything they did. So that you, the  
18 jury, think that if they breach the agreement, if they do the  
19 slightest thing wrong you'll hear the sound of paper tearing  
20 and Danielle Williams will go to prison for 80 years minimum  
21 and the other guy will go to prison for life and all is well  
22 with the world.

23 And, yet, you know that witnesses in this case have  
24 breached the agreement, violated the conditions of their  
25 release; used drugs when they weren't supposed to; committed

Eik9chr8

Summation - Mr. Goltzer

1 robberies while they were cooperating; lied to the government  
2 about it. And they're still hoping to go home.

3 Evans, who pled guilty to 17 serious crimes, facing  
4 life with no parole for possession of a gun during a robbery  
5 resulting in death. Same thing they're charged with.

6 MR. BAUER: Objection.

7 THE COURT: Overruled.

8 MR. GOLTZER: Evans pled guilty to conspiracy to  
9 murder. Actually murdering people. Drugs. Guns. Robberies.  
10 Seventeen counts. Kept track in the jail of what happened to  
11 people who had committed multiple murders. Single murders.  
12 Dealt drugs all their life.

13 I saw people walk out the door. I hope to walk out  
14 the door. I think that's fair. I think that's enough for what  
15 I did. Because I'm a good person now.

16 McDermott. Keep me in your country. I lied to get in  
17 here. I assaulted somebody. I stabbed somebody in the head.  
18 I'm facing 25 years in the penitentiary. Write me a letter.  
19 Let me give you him. Write me a letter.

20 Mallory. What's he facing? Seventeen years to life?

21 Pled guilty to giving somebody a gun. How do you know  
22 Mallory wasn't there? How do you know Mallory wasn't in it up  
23 to his neck? Because he said so?

24 And the government says it's an overwhelming case.  
25 How do you know when Burden, who probably has no liver left and

Eik9chr8

Summation - Mr. Goltzer

1 was pickled, how do you know he was talking about the same day  
2 as the robbery? How do you know he wasn't fed stories by this  
3 guy? You never saw him cross-examined. Do you think he would  
4 have been any better on cross-examination than Mallory? Do you  
5 think he would have been better on cross-examination than  
6 Baynes? Do you think he would have been better on  
7 cross-examination than McDermott?

8 The greatest engine, according to a learned judge, for  
9 finding the truth is cross-examination. And Burden was never  
10 cross-examined.

11 They take what they want from the tape and reject what  
12 they don't want from the tape.

13 Why didn't Mallory admit that he got the silver gun?  
14 He can't.

15 They say they have a wall of bricks. I say they have  
16 a house of cards. All you got to do is pull one out and the  
17 whole thing falls down. And that's what's happening here in  
18 the case against Tyrell Whitaker.

19 Really can't make it up. The government thinks it can  
20 put in what God left out. The government thinks that they can  
21 sign up these people and give them a soul. The government  
22 thinks they can sign up these people and give them a  
23 conscience. The government thinks they can motivate them to  
24 tell the truth by writing these agreements that they've been  
25 writing for years.

Eik9chr8

Summation - Mr. Goltzer

1           Of all the burglaries to be committed, why would you  
2 pick the mother of your friend's girlfriend? I don't -- can  
3 you understand that? Why would you take her -- I mean you like  
4 the girl, you're dating the girl -- young woman. I'm showing  
5 my generation. Forgive me.

6           Why would you pick that young woman's mother to  
7 ripoff, and to add insult to injury, steal her car and leave it  
8 somewhere so she can't get to work or can't pick up a child?  
9 Why would you do that?

10           Why would you claim that somebody committed a robbery  
11 where he lived, where he sold drugs, of an ecstasy dealer? Why  
12 would you claim that you got 40 out of a hundred pills and the  
13 other guy got whatever he got and put him into it? Why would  
14 you say that? Why would you do that?

15           Why would you commit six or ten robberies? Why would  
16 you commit 30 assaults? Why would you do those things?

17           Why would you gratuitously hurt people? Why would you  
18 lie?

19           Why would you lie about having a GED? Have you no  
20 shame? Yes. I have shame. I was ashamed of not having a  
21 diploma. I was ashamed of being in jail.

22           Were you ashamed of the crimes you committed everyday  
23 of your life? Oh, yeah, that too.

24           Do you think they change? Because they've gone to bed  
25 with the government? Do you think they've changed because they

Eik9chr8

Summation - Mr. Goltzer

1 put their hand on a Bible in a court of law?

2 I have demonstrated to you that each of the three  
3 witnesses lied about material facts in this case and that they  
4 spoke to each other before they tried to implicate him in a  
5 crime he didn't commit.

6 We have a problem in this country at the border. We  
7 have a lot of people trying to get in here any way they can.  
8 They're not just coming from Guatemala. They're not just  
9 coming from somewhere south of the border, Mexico.

10 MR. BAUER: Objection, your Honor.

11 THE COURT: Overruled.

12 MR. GOLTZER: They're coming from all over the world.  
13 And they have always come from all over the world legally,  
14 illegally, it doesn't matter. They've come, true, for a better  
15 life, for opportunity, economic opportunity.

16 But that's not the only reason they've come to this  
17 country. They have come to this country because there are  
18 rooms like this one, with judges like him, with lawyers like  
19 them, who can take somebody from the streets of Newburgh,  
20 New York and give him what you're entitled to, which is a fair  
21 trial where you put the government of the United States to its  
22 burden of proof and where, if a lawyer can stand up and raise  
23 reasonable doubts, you find him not guilty. That's the oath  
24 you took. And I have a right, and Ms. Stafford has a right, as  
25 Tyrell Whitaker's lawyer, to hold you to it.

Eik9chr8

Summation - Mr. Goltzer

1 I'd like to share with the jury a story which explains  
2 what this is really about and who you are. As I look out over  
3 the jury, I see men, women, people from obviously different  
4 background, different countries, originally. But you are  
5 united by a common heritage. It goes back to an English man,  
6 someone who came here to get religious freedom, who founded the  
7 State of Pennsylvania. His name was William Penn. I'm sure  
8 all of you have heard of William Penn. You may not all know  
9 the story of his background.

10 William Penn was of a certain denomination of the  
11 Christian faith who didn't abide by the teachings of the church  
12 of England. And the king at that time had passed a law that  
13 required that everybody pray in the same way.

14 William Penn, one of his coreligionists went to a town  
15 square. They got down on their knees. They looked up to their  
16 God and they prayed as they would, but not as the king wished.

17 So they were arrested. And they were brought before  
18 an English jury. And the English judge, having heard the  
19 evidence, did something that Judge Ramos could and would never  
20 do. He looked at the jury and he said I have an opinion. I've  
21 heard the evidence. Go back into your room. Come back out and  
22 find him guilty.

23 Up until that time that's how it worked in England.  
24 The jury went into the back room. They came back out sometime  
25 later. They looked up at the king's judge and they said no,



Eik9chr8

Summation - Mr. Goltzer

1 we're not going to do it.

2 The king's judge said that's not the way it works.  
3 I'm the king's judge. I want you to go back in that room and  
4 find him guilty. They came back out again and they said no,  
5 we're not going to do it. And the king's judge told them I'm  
6 not going to give you fire, I'm not going to give you food, I'm  
7 not going to give you water, and I'm not going to give you  
8 comfort. I'm going to hold you back in that back room until  
9 you come back and do what I want you to do, which is to find  
10 William Penn guilty.

11 They came back again and again and they said no. And  
12 finally the king's judge got tired and William Penn went to  
13 Pennsylvania, a free man.

14 Since that day, no prosecutor, no government, no  
15 judge, no king, no queen in England or here, or in any country  
16 in the world that follows our rules can tell you what to do.

17 You're not just here as a collective body. You're  
18 here as individuals.

19 Let me put it to you this way. It's six months from  
20 now. You're home. You're minding your business. You're  
21 feeding your kids. You're reading a newspaper or a book.  
22 You're watching television. It doesn't matter. Suddenly you  
23 hear the following.

24 Get up, walk over to the door, who is at the door?  
25 Mallory, Baynes, and McDermott. And you look up. And you say,

Eik9chr8

Summation - Mr. Goltzer

1     Gentlemen, what are you doing here? They say, Remember us? We  
2     were the guys who testified against Tyrell Whitaker. Now, you  
3     know we're honest people because you convicted him. So we  
4     thought we'd come to you. We don't live in Newburgh, New York,  
5     anymore. We live down in Philadelphia. And we're a little  
6     short on cash. So what we'd like you to do is take a check  
7     from one of us for two hundred dollars, go to your piggy bank,  
8     take out the two hundred dollars, give it to us, we'll go down  
9     to Philadelphia. We'll work for a couple of weeks. We'll put  
10    the money in the bank and we'll pay you back. You know you  
11    could trust us because you believed us enough to convict Tyrell  
12    Whitaker, so give us the money.

13            Would any of you cash that check? What any of you  
14    take a quarter out of your pocket on their promise to pay you  
15    back?

16            What you need to understand is that they're writing a  
17    check in this courtroom but it's not for a couple of hundred  
18    bucks. It's payable to the prosecution for the sum of his  
19    life.

20            MR. BAUER: Objection.

21            MR. GOLTZER: For the sum of his future.

22            Do not let them cash that check. Because that would  
23    be wrong. You know it. It wouldn't be just.

24            He's not guilty. They haven't proved him guilty. The  
25    only verdict you can reach in this case for the two crimes he's

Eik9chr8

Summation - Mr. Goltzer

1 charged with is not guilty, not proven.

2 Thank you.

3 THE COURT: Thank you, Mr. Goltzer.

4 Ladies and gentlemen, it's 4:30. We're not going to  
5 begin another summation. So we're going to stop today and ask  
6 you to be back here tomorrow morning no later than 9:25 so we  
7 can get started at 9:30. Have a very pleasant evening. Until  
8 then do not discuss the case, including on social media.

9 (Jury excused)

10 (Continued on next page)

Eik9chr8

Summation - Mr. Goltzer

(In open court)

THE COURT: Anything for me?

MR. BAUER: Just we still owe you a verdict sheet, we still owe you now a clean copy of an indictment, we owe you some jury instructions.

THE COURT: Correct.

MR. BAUER: What I propose to do on the verdict sheet and the indictment is to send it to defense counsel this evening to have a look, so that way the parties will have, as best we can in these, before we send it to you all tonight. That way it won't be objectionable tomorrow.

THE COURT: Again, I just want to make sure that we have it in time to make whatever changes we need and to make the appropriate copies so we have it in a binder for the jury presumably tomorrow afternoon.

MR. BAUER: So in our order of priority we'll do the instructions first.

THE COURT: Yes, please. Okay. Anything more?

Okay, ladies and gentlemen, see you tomorrow.

(Adjourned to August 21, 2014, 9:00 a.m.)

GOVERNMENT EXHIBITS

Exhibit No.	Received
416 . . . . .	2068

DEFENDANT EXHIBITS

Exhibit No.	Received
-------------	----------

Eik9chr8

Summation - Mr. Goltzer

1	H and I . . . . .	.2056
2	C . . . . .	.2059
3	D . . . . .	.2061
4	E . . . . .	.2062
5	F . . . . .	.2062
6	G . . . . .	.2063
7	T1 . . . . .	.2068
8	T2 . . . . .	.2069
9	T3 . . . . .	.2071
10	T4 . . . . .	.2073
11	T5 . . . . .	.2073
12	T6 . . . . .	.2074

13

14

15

16

17

18

19

20

21

22

23

24

25